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Telecommunications Resellers of Utah v. Public Services Commission of Utah; Brent H. Cameron, chairman; James M. Byrne; Commissioner; Brian T. Stewart, Commissioner: Brief of Petitioners

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TELECOMMUNICATIONS RESELLERS OF UTAH,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF UTAH; BRENT H. CAMERON, Chairman; JAMES M. BYRNE, Commissioner; BRIAN T. STEWART, Commissioner,

Respondents.

860124, 860285, 860400

Case Nos. 860124, 860285 and 860400

Argument Priority No. 9

TEL-AMERICA OF SALT LAKE CITY, INC.,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF UTAH; BRENT H. CAMERON, Chairman; JAMES M. BYRNE, Commissioner; BRIAN T. STEWART, Commissioner,

Respondents.

BRIEF OF PETITIONERS

Petition for Review of Orders of the Public Service Commission of Utah

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PARTIES APPEARING IN PROCEEDING BELOW

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TABLE OF CONTENTS

TABLE OF CITATIONS AND AUTHORITIES

Administrative Regulations

JURISDICTION OF THE COURT

This Court has jurisdiction to review this matter pursuant to Section 54-7-16, Utah Code Ann. (1986).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Commission fail to make sufficiently detailed findings so as to apprise the court of the basis for its decision as to implementation of access charge tariffs in its Report and Order of October 29, 1985?

2. Did the Commission act arbitrarily, capriciously and contrary to law in establishing the access charge tariffs?

3. Did the Commission err in concluding that the October 29, 1985 Report and Order was effective when issued and that the stay provision of Utah Code Ann. § 54-7-15 did not operate to suspend the effective date of the Access Tariff?

4. Was the Commission required to follow and if so, did it fail to follow, the procedures of the Administrative Rule Making Act?

DETERMINATIVE STATUTORY PROVISIONS

Utah Code Ann. § 54-3-1 (1986)

Utah Code Ann. § 54-7-12(2) (1986)

Utah Code Ann. § 54-7-15 (1986)

Utah Code Ann. § 54-7-16 (1986)

Utah Code Ann. § 63-46a-2(8)(a) (1986)

Utah Code Ann. § 63-46a-3 (1986)

Utah Code Ann. § 63-46a-4 (1986)

These statutory provisions are reproduced in whole in the Addendum to this Brief.

STATEMENT OF THE CASE

Nature of the Case

This is a petition for review of Orders of the Public Service Commission of Utah ("PSC" or "Commission") issued in Case No. 83-999-11 regarding Intrastate Inter-LATA and Intra-LATA telephone services. In this case, the Commission addressed competition in the telecommunications industry within the state among resellers and other interexchange carriers and established Utah Access Charge Tariffs (the "Utah Access Tariff") which set rates for access by interexchange carriers to the local networks of Mountain Bell and independent telephone companies. In this petition for review, petitioners ask the Court to set aside the Utah Access Tariff since the Commission exceeded its authority in establishing it.

Course of Proceedings Before the Commission

On August 9, 1983, this proceeding was initiated as a generic proceeding to address numerous issues in the telecommunications industry in the State of Utah including the establishment of an access charge tariff (R. 1863). The Commission requested that Mountain Bell and other independent telephone companies file proposed tariffs which they did (R. 2362).

In November and December 1984 the Commission held hearings regarding the access tariffs and other telecommunications

issues (R.0001-1882). On October 29, 1985 the Commission issued its Report and Order in Case No. 83-999-11 (the "Report and Order"; See Addendum, Exhibit "A") establishing the Utah Access Tariff to be effective December 1, 1985.

STATEMENT OF FACTS

A. Judicial and Regulatory Background

1. The Breakup of AT&T.

The issues before the Commission in Case No. 83-999-11 were an outgrowth of the breakup of the Bell System on a national level. Since the events in the telecommunications industry in the past five years are a necessary background to understand the issues in this case, they are summarized here.

On August 24, 1982, a Modified Final Judgment (the "MFJ") was entered in the case of United States v. American Telephone and Telegraph Company, 552 F. Supp. 131 (D.D.C. 1982), aff'd., 460 U.S. 1001 (1983) (see R. 1883) by Judge Harold H. Greene, based largely on a proposed consent decree of the litigants, thus resolving years of litigation in which the government had sought to prove monopolization by AT&T with respect to a broad variety of telecommunications services in violation of Section 2 of the Sherman Act and had sought the divestiture from AT&T of the twenty-two Bell Operating Companies (the "Operating Companies") including Mountain Bell. The MFJ splits the Bell System into two basic parts - the competitive portion providing long distance services and the noncompetitive portion of the business which controls local telecommunications service. The

MFJ removed from the Bell System the function of supplying local telephone services by requiring AT&T to divest itself of the portions of its Operating Companies which performed that function. Id. at 141.

In order to implement the divestiture, all Bell territory was divided into LATAs.[1] The MFJ allows Operating Companies to transport telecommunications only within the LATA. The MFJ does not permit the Operating Companies to carry calls between different LATAs (inter-LATA traffic.)[2] Id. at 186. Only AT&T and other interexchange carriers[3] may carry telecommunications traffic which originates in one LATA and terminates in another.[4] The court held that restricting the Operating

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[1] The acronym "LATA" stands for "Local Access and Transport Area." A LATA fixes the boundaries beyond which a Bell company cannot carry telephone calls. A LATA is generally centered upon a metropolitan area. A Bell Operating Company after divestiture may engage in exchange telecommunications, i.e., transporting traffic between telephones located within a LATA and may provide exchange access within a LATA, that is, it may link a subscriber's telephone to the nearest transmission facility of AT&T or one of AT&T's long-haul competitors. United States v. Western Electric Company, 569 F. Supp. 990, 993-94 (D.D.C. 1983) (Western Electric I) (R. 4130-4197).

[2] A telephone call which originates in one LATA and terminates in another is an "interexchange telecommunication" and may not be handled by an Operating Company even if it performs services in both LATAs. Western Electric I, supra, 569 F. Supp. at 994.

[3] Also referred to as inter-LATA carriers, or other common carriers (OCCs); the term "Interexchange Carriers" includes resellers and facilities-based long distance carriers, such as AT&T and MCI.

[4] Interexchange carriers are not prohibited under the MFJ, however, from also engaging in intra-LATA traffic. Western Electric I, supra, 569 F. Supp. at 994, n. 16.

Companies from providing interexchange services is necessary to preserve free competition in the interexchange market. Id. at 188.

The LATA does not distinguish the area in which a telephone call will be "local" from that in which it becomes "toll." The establishment of the LATA boundaries had nothing to do with local calling areas,[5] and calls placed within a LATA may be either "local" or "toll." After analyzing issues involving the appropriate size of the LATAs,[6] Judge Greene established a single LATA in Utah.[7] The Bell Operating Company serving the

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[5] Local calling area (also referred to as local service areas) are areas designated by regulators, within which a call may be made without incurring a toll charge. Local calling areas are combinations of one or more local exchanges. A local exchange is identified by the first three digits of the telephone number. Western Electric I, supra, 569 F. Supp. at 1003, n. 18 & 59.

[6] In determining the size of the LATAs, the court noted in a later related proceeding, that the establishment of many, relatively small LATAs would tend to favor the interexchange competitors, principally because this would result in a diminution of the number of points between which any particular Operating Company - a potential competitor of the interexchange carriers for inter-LATA traffic - may carry telecommunications. Western Electric I, supra, 569 F. Supp. at 995. On the other hand, the creation of relatively few, large LATAs would tend to favor the Operating Companies, since this would increase the area in which these companies may carry telecommunications. Id. The larger the LATAs, the more intrastate toll traffic would be intra-LATA.

[7] Although for the most part, Utah has only one LATA, there are portions of other LATAs within the State boundaries. Thus, it is possible to place an intrastate inter-LATA call in this state. Although the LATA boundaries are not entirely contiguous with the state boundaries, the principal LATA contains nearly all of the state's population. If fact, only about 400 customers reside in areas within the state, but outside the central LATA. Telecommunications within the State and between the LATAs was principally carried by AT&T at the time of the proceedings addressed herein.

Utah LATA is Mountain Bell, and portions of the State and the LATA receive local telephone services from independent companies, some of which are members of the Utah Independent Exchange Carriers ("UIEC") (collectively the Independent Carriers").

An interexchange carrier will establish a point of connection or Point of Presence ("POP") to the Operating Company's facilities within the LATA.[8] The Operating Company routes traffic from an interexchange carrier's POP in a LATA to a local end office[9] for connection or "termination" of a call to local Operating Company subscribers and from local subscribers of the interexchange carrier to the POP for "origination" of a toll call. Thus, an interexchange carrier must have access to local telecommunications facilities in order to market long distance services either intra-state or inter-state.

The MFJ required the Operating Companies by September 1, 1986 to "provide to all interexchange carriers and information service providers exchange access, information access, and

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[8] The Operating Companies must deliver traffic originating or terminating within a LATA to a point of presence (POP) within the LATA designated by an interexchange carrier for the connection of its facilities with those of the Operating Company. This is how the long-haul carrier will obtain access to the local "loop." Western Electric I, supra, 569 F. Supp. at 994, n. 13. An interexchange carrier need only establish one POP per LATA to be in a position to offer its services to all telephone users within the LATA. Id. at 1004, n. 62.

[9] An end office is the plant into which individual subscriber's telephone access lines feed. It is typically the point of concentration of telecommunications traffic closest to the subscriber - i.e., the point of origination or termination. United States v. Western Electric Co., Inc., 569 F. Supp. 1057, 1064, N. 18 (D.D.C. 1983) (Western Electric II)

exchange services for such access . . . that is equal in type, quality, and price to that provided to AT&T and its affiliates." United States v. AT&T, supra, 552 F. Supp. at 227. The court later defined "equal access" as access whose "overall quality in a particular area is equal within a reasonable range which is applicable to all carriers." United States v. Western Electric Co., Inc., 569 F. Supp. 1057, 1063 (D.D.C. 1983) ("Western Electric II"). This ruling was based on representations by the Operating Companies that customers will perceive no qualitative differences between AT&T transmissions and those of its competitors - at least with respect to those portions of the transmissions carried by an Operating Company. Id. at 1063.

One of the government's principal contentions in the divestiture case was that the Operating Companies provided interconnections to AT&T's intercity competitors which were inferior in many respects to those granted to AT&T's own Long Lines Department. The court stated there was ample evidence to sustain these contentions. United States v. AT&T, supra, 552 F. Supp. at 195. The court also stated that a substantial AT&T bias had been designed into the telecommunications network and that it was imperative that any disparities in interconnection be eliminated so that all interexchange providers would be able to compete on an equal basis. Id.

The proposed decree in the divestiture case would have permitted the Operating Companies to charge all interexchange carriers the same amount for access services during the interim period when AT&T still received services superior to those

provided to the other carriers.[10] The court stated that on its face, this provision of the decree appeared patently anticompetitive, noting that it would be difficult for a competitor of AT&T to attract business if they were forced to pay the same amount in access charges for non-premium services as AT&T paid for premium services. Id. at 199. The court stated that no persuasive justification was given for this proposal, found that there should be no exception from the general rule that rates should vary depending upon costs and ordered the decree modified accordingly. Id. The court stated that if the cost of providing access services to the other carriers is less than that of providing access services to AT&T, the Operating Companies should file tariffs reflecting that difference.[11] Id.

The court stated that the divested Operating Companies must file tariffs for their access services.[12] The MFJ required

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[10] Conversion to equal access was to be phased in over a period of three years. The court recognized that it would take months and even years to make major changes in switching equipment necessary to provide equal access. Since AT&T already had superior access, it would continue to receive such until equal access was available to all interexchange carriers. United States v. AT&T, supra, 552 F. Supp. at 199.

[11] AT&T stated that there was no difference in costs between the two types of access. The court observed that if there was no difference in the cost of providing these services, it would be appropriate for charges to AT&T to be increased to reflect its higher quality connection. United States v. AT&T, supra, 552 F. Supp. at 199, n. 286, 287.

[12] Revenues collected pursuant to these tariffs will substitute for funds received prior to divestiture by the Operating Companies under the division of revenue process, which allocated interstate toll revenues between the Operating Companies and the Long Lines Division. United States v. AT&T, supra, 552 F. Supp. at 196, n. 271.

that the Operating Companies file tariffs which are cost-justified but it does not limit the authority of regulators to allocate costs pursuant to regulatory policies.[13] Id. at 196, 233.

The Operating Companies committed to provide equal access for intra-LATA service. Western Electric II, supra, 569 F. Supp. at 1107. The access offered to interexchange carriers for intra-LATA toll calls is to be equal in technical quality to the access provided to these carriers for inter-LATA calls, meaning that both types of access connections will be performed by the same exchange access facilities.[14] Id. at 1108.

2. The FCC Interstate Tariff.

The tariff proposed by Mountain Bell in the proceeding below with certain exceptions mirrors Tariff FCC No. 1 of the National Exchange Carrier Association, Inc. (the "FCC Tariff")

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[13] Tariffs for intrastate interexchange access services will be filed with the state regulatory commissions and tariffs for interstate interexchange services with the F.C.C. United States v. AT&T, supra, 552 F. Supp. at 196, n. 271.

[14] The Commitment of the Bell Operating Companies to provide equal access was filed in the United States District Court for the District of Columbia in response to the Court's Opinion in Western Electric II, supra, and submitted as part of the record here. (R. 2181-2195.)

filed May 18, 1984 and which became effective May 25, 1984 as a successor to the ENFIA tariff.[15]

The FCC tariff incorporated a 55 percent discount for non-premium Feature Group A ("FGA") and Feature Group B ("FGB") services. Prior to May 25, 1984, the resellers generally used ENFIA-A access lines to complete intrastate calls. (R. 1337.) When the FCC tariff went into effect, the ENFIA terminology was eliminated and replaced by the feature group concept and Mountain Bell began charging the interstate FGA and FGB charges. At that time the access charges went from the ENFIA rate of $225 per line/per month to the discounted FCC Tariff rate of $330 per line per month. (R. 463.)[16] The non-discounted or premium FCC charge was approximately $700 per line per month. (R. 0303.)

Feature Groups are classified A, B, C and D and provide different quality services. To place a call under FGA, the reseller's customer must dial seven digits to reach the reseller's switch, then a five to seven digit personal identification number (a specific number that identifies a customer), and finally the ten digits corresponding to the area code and

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[15] ENFIA is an acronym for Exchange Network Facilities for Interstate Access. (R. 325.) The ENFIA tariff never became effective as filed. Instead, the FCC initiated negotiations between the parties to develop interim access rates. Out of this process was born the Interim Settlement Agreement which was accepted as the operative ENFIA tariff. Exchange Network Facilities (ENFIA), 71 FCC 2d 440 (1979).

[16] The FCC approved the interstate tariffs based on an analysis and acceptance of cost support information that was filed by carriers and the National Exchange Carriers Association. (R. 1670.)

telephone number of the party to be reached. (R. 3228-29.) For FGB, the dialing plan is slightly different. Under FGB, carriers are able to have a nationwide access code to relieve dialing requirements. (R. 0074.) Feature Group C ("FGC"), interstate inter-LATA calls requires the customer to dial one plus the area code plus seven digits. For intrastate inter-LATA calls, the customer would dial one plus seven digits. FGC Intrastate intra-LATA calls are not available. FGC is only offered to AT&T and Mountain Bell. (R. 0075.) Feature Group D ("FGD") is the higher quality service available to other carriers including resellers after conversion to equal access.

Prior to divestiture, fixed (non-traffic-sensitive or "NTS") costs associated with local telecommunications facilities (the "local loop") were allocated internally within the Bell system with toll revenues, both inter- and intra-state, contributing significant NTS cost support (see R. 296-98), so that local subscriber rates remained relatively low. (See R. 67, 69.) After divestiture, resellers and others in the long-distance toll market, without their own local or long-haul facilities, needed access to such facilities to both originate and terminate subscriber calls within the local loop and to transmit those calls long-distance. Such access falls into several categories, i.e., inter-state, inter-LATA; intra-state, intra-LATA; and intra-state, inter-LATA. It is recognized that where access is allowed, charges or rates for such access must be on a level which contributes fairly to local loop NTS costs. (See R. 69, 0476, 0745-46.) At the

inter-state, inter-LATA level, such access charges were established in proceedings before the Federal Communications Commission ("FCC"). The regulation of intra-state competition and the establishment of intra-state access charges was left to the states themselves. The allocation of responsibility for NTS costs support among the local Operating Company's local subscriber rates, its own intra-LATA toll rates, inter-state access charges and access charges to its intra-state competitors is thus a major component of local access-tariff proceedings (see R. 205-212, 0479, 0543, 1267, 1491-92, 1601-05), as is the issue of whether intra-state intra-LATA competition ought to be allowed at all.

B. The Proceeding Before the Commission

1. Petitioners are Resellers of Telecommunications Services.

Petitioner Tel-America of Salt Lake City, Inc. ("Tel-America") is a long distance telecommunications service reseller. Petitioner Telecommunications Resellers of Utah ("TRU") is an association of resellers operating in the state of Utah of which Tel-America is a member. The Commission has authorized several companies to provide intrastate telecommunications services through resale. A reseller purchases telecommunications services wholesale, in this case primarily from Mountain Bell, and then retails the services to consumers. (R. 3226.) Resellers do not use their own transmission facilities to provide services. TRU members compete with Mountain Bell, AT&T and other facilities based carriers.

2. Telephone Services Used by Resellers Prior to Adoption of the Utah Access tariff.

Prior to the adoption of the Utah Access Tariff, resellers' customers were purportedly placing intra-state, intra-LATA calls over the interstate system. Although such use of the interstate feature group system was arguably not permitted by the resellers' Certificates of Convenience and Necessity,[17] which was limited to intra-LATA WATS resale, it was difficult or practically impossible to block or adequately monitor such use. Customers were thus allegedly bypassing the authorized intra-LATA WATS tariff by using the less expensive interstate feature groups system for unpermitted intra-LATA calls. Mountain Bell claimed that a Utah access charge tariff was necessary so that revenues from access services would be accounted as intrastate and not interstate revenues and be properly allocated to intra-state rather than inter-state NTS costs. (R. 496, 498, 1372, 1499.)

3. Initiation of Proceedings and Preliminary Orders.

On August 9, 1983, the Division of Public Utilities (the "Division") petitioned the PSC to initiate a generic proceeding to investigate, review and consider issues relating to access charges for intrastate, inter-LATA and intra-LATA telephone

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[17] At the time of the subject proceedings, resellers were subject to PSC regulation. A subsequent amendment of the Public Utilities Act removed sellers from PSC overview. Utah Code Ann. §§ 54-2-1(30) (1986).

services. (R. 1883.) The Division stated that such a proceeding was made necessary in part by Judge Greene's decision in the AT&T case and that the Commission must as a result consider whether to establish access charges for the intrastate toll network. (R. 1863.) The Division claimed that the use of a generic proceeding would allow all interested parties to come before the Commission and make known their views on the development and implementation of access charges in the State of Utah. (R. 1863.) Additional impetus for the Petition appeared to be the anticipated cancellation on January 1, 1984 of the existing contracts among Mountain Bell and the UIEC for intrastate toll revenue settlements. The Division stated that if new settlement contracts were not in place by January 1, 1984, there was a probability that Utah independent telephone companies would lose intrastate toll revenue. (R. 1884.) On August 10, 1983, the PSC ordered that such a generic proceeding be commenced. (R. 1887.)

On August 29, 1983, the Commission issued an Order indicating that it would address fifteen issues within the following general categories: (1) competition; (2) Intrastate Toll Settlement Contracts; and (3) Intrastate, Inter-LATA and Intra-LATA Access Charges. (R. 1893-1897.) The Commission ordered Mountain Bell and the UIEC to file formal access charge tariff proposals.[18] (R. 1898.) At hearings on December 5 and

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[18] The Commission ordered that tariff proposals be filed by October 7, 1983. Mountain Bell later advised the Commission that because of uncertainty created by an October 19, 1983 Federal Communications Commission decision, Docket No. 83-1145 (FCC 83-470) which delayed the implementation of interstate access charge tariffs, it would be impossible to file the
(Footnote continued on next page.)

6, 1983, two tariffs (the "Bulk Bill Tariff") were presented to bill AT&T Communications, which carried the relatively small amount of intrastate, inter-LATA traffic, on a bulk basis until permanent access tariffs could be put in place.[19] The Bulk Bill Tariff was approved by the Commission to become effective on January 1, 1984 and was to terminate on October 1, 1984 unless further extended by order of the Commission. (R. 2336.) It was also held that further hearings on a permanent access tariff would be postponed until more information was available. (R.2337.)

At a hearing on May 10, 1984, the Division advised the Commission that recent FCC decisions provided adequate direction for the exchange carriers in Utah to advise the Commission whether it should maintain the current Bulk Billing Tariff, or mirror the interstate access charge tariffs for interexchange carriers and resale carriers on an intrastate, inter-LATA and/or intra-LATA basis. (R. 2357.) On June 1, 1984, the Commission ordered Mountain Bell and the independent telephone companies to file proposed intrastate, inter-LATA and intra-

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(Footnote continued from previous page.)
proposed intrastate tariffs until more information was available since Mountain Bell's proposals for inter-LATA and intra-LATA access charges essentially mirrored the FCC access charge decisions. (R.2283.)

[19] The amount of the Bulk Billing Tariff was estimated by Mountain Bell as being the amount of revenues that would be lost to Mountain Bell as a result of the loss of the Utah interLATA toll traffic due to divestiture. (R. 1668.)

LATA access charge tariffs with the Commission by June 20, 1984. (R. 2362.)[20] The Commission also set forth in its June 1, 1984 Order twelve questions which it asked the parties to address. (R.2358-60.)[21] Mountain Bell filed a 455 page proposed access charge tariff with the Commission on June 20, 1984 essentially mirroring the FCC tariff, including the 55% discount for FGA and FGB. (R. 3173-3176.) On or about August 18, 1984, Mountain Bell filed a revised tariff which contained several exceptions to the FCC tariff, including elimination of the FGA and FGB discount. (R. 3199.) On July 27, 1984, the Commission ordered that the effective date of Mountain Bell's intrastate inter-LATA access charge tariff was extended pending a final order from the Commission on the proposed tariffs. (R.2366.)

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[20] The Commission thereafter granted the independent telephone companies until August 8, 1984 to file either proposed intrastate inter-LATA and intra-LATA access charge tariffs or a concurrence with the previously filed Mountain Bell tariffs. (R.2365.) UIEC and Continental Telephone Company of the West timely filed concurrences in the Mountain Bell proposals with some proposed changes. The arguments as to the Mountain Bell proposals apply equally to the tariffs filed by the independent telephone companies as they are based essentially on the same data or lack of data.

[21] In its October 29, 1985 Report and Order the Commission gave answers to these twelve questions without analysis. (R. 2714-19.)

4. The Utah Access Tariff Proposals.

The Commission held hearings on November 14-17, 19-21 and December 4-7, 1984 regarding the access tariffs and telecommunications competition issues. (R. 0001-1882.) Twenty-five witnesses presented testimony to the Commission.

The Utah Access Tariffs set forth proposed rates for the connection by interexchange telecommunication carriers such as Tel-America and other members of the petitioner organization to local telephone exchanges.

Under the access tariff proposed by Mountain Bell, Mountain Bell would charge TRU members for access to customers as well as for access to the party called by those customers. (R. 0425.) The tariff allows for interexchange carriers, including resellers, to use Mountain Bell facilities for the purpose of extending services to local exchange customers within the LATAs served by Mountain Bell. (R. 0425.)

The Utah Access Tariff was not based on Utah specific costs. Many witnesses testified, including several Mountain Bell witnesses, that the proposed tariff rates were not based on Utah-specific cost data. (See, e.g., R. 3932, Testimony of Thomas A. Garcia for Mountain Bell; R. 302, 306, 3178, 3191, 3211, 3221, 3231 Testimony of Loyd I. Tanner for Mountain Bell; R. 4265, Testimony of James L. Hansen for AT&T). Mountain Bell did not present evidence on cost allocation methods for intrastate non-traffic sensitive (NTS) cost recovery.[22]

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[22] Thomas A. Garcia testified for Mountain Bell that it did not have state-specific data for 1984 regarding NTS contributions from its toll services. (R. 4411.)

Mountain Bell stated that efforts were under way to identify specific intrastate costs from which to base rate levels and when those studies were completed, it would use them in its proposals for intrastate access charges (R. 3178, 3211.) Mountain Bell requested that the Commission not delay in implementing Mountain Bell's proposed tariff but that the issue of cost-based pricing be further examined through the continuation of Case No. 83-999-11 after the tariff had been enacted. (R. 3214.)

Mountain Bell's final proposed access tariff mirrored the FCC tariff, with several notable exceptions. (R. 3199-3204). The principal exception was the elimination of a discount for FGA and FGB service in the Mountain Bell proposed tariff. (R. 3200.) Mountain Bell stated that the reason for proposing nondiscounted rates was primarily to avoid adverse revenue impacts on Mountain Bell resulting from a shift of MTS and WATS to Feature Group A (FGA) and Feature Group B (FGB) circuits. (R. 224, 3206.) In addition, Mountain Bell claimed that the discounts in the federal tariff were not based on cost differences, i.e., even though they may have quality differences, the cost to provide each service was the same. (R. 458.)

MCI asserted that Mountain Bell's costs in providing FGA and FGB access were significantly lower than the cost to provide FGC access to AT&T and Mountain Bell and therefore justified a differential between access charges for FGA and FGB

and access charges for FGC and FGD.[23] (R. 384-386.) Many witnesses testified that FGA and FGB is inferior service in that it provides lower quality transmission and that therefore a discount was justified.[24]

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[23] MCI disagreed with Mountain Bell's claims that no cost justification existed for the FCC discount and cited factors that related to a cost differential between FGA and FGB. (R. 384-386.)

[24] MCI testified it requires that MCI customers dial twelve more digits per call than AT&T customers, it results in transmission loss and it requires more expensive interfaces. (R. 360-362) It was claimed that connections afforded through FGA and FGB provide from three to six decibel db more loss than other access methods which represents from one-half to one-fourth of the signal strength. Jerry Dyer for TRU testified that the discount for FGA and FGB is justified on a temporary basis because the access provided to resellers is inferior to that provided to Mountain Bell and AT&T in that: (1) FGA provides lower quality transmission than that provided to Mountain Bell and AT&T; (2) FGA does not provide automatic number identification (ANI) thus requiring customers of resellers to enter personal identification numbers of from 5 to 7 digits; (3) FGA does not provide answer supervision which requires resellers to use sophisticated and expensive software and hardware to detect when customers answer and hang up; (4) FGA cannot be accessed by customers with rotary phones; and (5) since reseller customers must dial more numbers to complete calls, the resellers are required to invest in more expensive switching equipment than the established carriers. (R. 1323-24.) TRU also testified that if premium non-discounted rates are adopted, resellers using FGA would be forced to charge their customers intrastate toll rates in excess of those charged by established carriers and may result in the demise of resellers. (R. 1324.) TRU also claimed that the justifications for discount pricing for FGA were line quality, all encompassing or total competition and the provision for going to premium rates at the time when equal access Feature Group D lines became available. (R. 4330.)

5. The Commission's October 29, 1985 Report and Order.

The Commission issued its Report and Order, inter alia, on October 29, 1985. The Report and Order established the Utah Access Tariff to become effective on December 1, 1985.

In the Commission's Findings of Fact and Conclusions of Law with Respect to the Utah Access Tariff, it stated only that the access charges should be based on the non-discounted interstate access charges implemented by the FCC[25] and that the access tariffs were fair and reasonable and should be adopted.[26] The Commission recognized that rates should be cost-based,[27] but admitted that it had not analyzed Utah-specific costs on which

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[25] The Commission stated: "The need for an access charge is not dependent on the approval of facility-based interexchange competition. Competition already exists between Mountain Bell and the resellers on an inter- and intra-LATA basis and access charges are required. These charges should be based on the non-discounted interstate access charges implemented by the FCC. Non-traffic sensitive cost should be apportioned between all services, but a Utah specific analysis is required for this purpose." Report and Order, p. 43. (R. 2715.) See Also Report and Order, p. 47 (R. 2719).

[26] The Commission stated: "11. The Commission finds that the access tariffs proposed by the local exchange carriers are fair and reasonable and should be adopted." Report and Order, p. 49. (R. 2721; see also, R. 2719, 2715.)

[27] "7. Competitors in the intrastate toll market need to cover the cost they impose on the network. Rates for services to interexchange carriers should be set to cover the costs of interexchange carriers' usage of the network as well as connection costs." Report and Order, p. 49. (R. 2721.)

to base the access rates.[28] The Commission created a telecommunications task force to study, inter alia, Utah-specific costs to be included in access charges. (R. 2725.)

On or about November 18, 1985, TRU filed a Petition with the PSC for Review and/or Rehearing of the Report and Order alleging, inter alia, that the Commission acted arbitrarily, capriciously and contrary to applicable law in establishing the Utah Access Tariffs and that the Commission's relevant findings were unsupported by any competent or substantial evidence relevant to costs of services and rates of return as required by law. (R. 2762.) On February 6, 1986, the PSC denied the Petition for Review and/or Rehearing. (R. 2769-2773.) See Addendum, Exhibit "B," February 6, 1986 Order.

The Commission stated in its February 6, 1986 Order that:

> The Commission was well aware that the Utah-specific costs were not available during the access charge proceeding. As a Commission, we would have liked to have had such costs before us. However, the need for an access tariff was apparent, as the record indicates. We did not have time to wait for Utah-specific cost data. We did, however, try to make it clear that an adjustment of the access tariff would be considered following the examination of the Utah-specific costs by the Telecommunications Task Force called for in the Order.
>
> The remaining issues raised by MCI, TRU and AT&T are questions we believe were fully examined in the hearing and considered by the Commission. We do not see anything in the petitioners to persuade us that

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[28] "The Commission finds that more cost information is required for purposes of appropriately allocating NTS cost to access charges. Utah-specific costs must be developed. The telecommunications task force should examine these issues and make recommendations to the Commission regarding them." Report and Order, p. 51. (R. 2723.)

> our decisions were in error in light of our opinion regarding intra-LATA competition.

(R. 2771.) In the interim the Telecommunications Task Force has made no report on Utah-Specific costs to the Commission and the rate structure has not been either reconsidered or adjusted.

6. Background of the Petitions for Review

These petitions for review arise out of the Commission's determinations regarding Intrastate Inter-LATA and Intra-LATA telephone services. On March 3, 1986, TRU filed a Petition for Review with this Court. (Case No. 860285). In its Petition for Review, TRU requested the court to review the October 29, 1985 Report and Order and the Order denying petitioner's Petition for Review and/or Rehearing issued on February 6, 1986.

On March 7, 1986, following the filing of the Petition for Review with this Court, the Commission issued a subsequent Order purporting to clarify the effective date of the Commission's Report and Order. (R. 2804-2810.) See Addendum; Exhibit "C"; March 7, 1986 Order. Petitioner Tel-America filed a Petition for Review and/or Rehearing with the Commission on March 25, 1986 regarding this order. (R. 4415.) On May 1, 1986, the Commission issued an Order denying the Petition for Review and/or Rehearing. (R. 4427.) See Addendum; Exhibit "D", May 1, 1986 Order. The Commission in its March 7, 1986 and May 1, 1986, Orders held that the Report and Order was effective when issued. On May 29, 1986, Tel-America filed a

Petition for Review with this Court of the March 7, 1986 and May 1, 1986 Commission Orders. (Case No. 860285.)[29]

On May 20, 1986, Tel-America filed with the Commission a Petition for Review and/or Rehearing, or in the Alternative Motion to Reopen in connection with the Commission's Order of May 1, 1986. (R. 4428.) Tel-America asserted in this petition that the Commission issued its October 29, 1985 Report and Order in a rulemaking proceeding but failed to comply with the Administrative Rulemaking Act in so doing. On June 24, 1986, the Commission issued an Order stating that it was not required to comply with the Administrative Rulemaking Act. (R. 4435.) See Addendum; Exhibit "E", June 24, 1986 Order. Thereafter, on July 23, 1986 Tel-America filed a petition for review of the Commission's March 7, 1986 and May 1, 1986 Orders and the June 24, 1986 Order denying the Petition for Review and/or Rehearing or in the Alternative, Motion to Reopen. (Case No. 860400.) On September 3, 1986, the Court ordered the consolidation of Case Nos. 860124, 860285, and 860400.

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[29] The Petition for Review in Case No. 860285 contained a misnomer in the name of petitioner. On July 21, 1986, Petitioner filed a Motion to Correct Misnomer in the name of the party named as the petitioner in the Petition for Review or in the Alternative Motion to Substitute Parties. On August 11, 1986, the Court granted the motion and allowed the correction of the name of the petitioner in Case No. 860285 to Tel-America of Salt Lake City, Inc.

SUMMARY OF ARGUMENT

1. In order that the Commission fulfill its regulatory responsibilities and that this Court may properly review the Commission's orders, it is required to make detailed findings of fact on all ultimate issues within the rate-setting process and subsidiary findings detailed enough to show that its decisions are logical and supported by law and fact. In the instant case, the Commission established a Utah Access Tariff based on the FCC non-discounted Tariff without setting forth in the Report and Order anything more substantial than a summary of testimony and conclusory statements of its decisions. The Commission's Findings of Fact are insufficiently detailed to allow proper review of its decisions and should therefore, as to the Utah Access Tariff, be set aside.

2. Mountain Bell and the Independent Carriers presented insufficient detailed evidence to the Commission to support their proposed access tariffs. The proposed tariffs were based on the FCC access tariff, but without the 55% discount imposed by the FCC. The cost data supporting the FCC Tariff was not before the Commission and the Commission had no Utah-specific data on costs or revenues which it could compare to determine whether the FCC non-discounted Tariff was just and reasonable within the Utah context. The Commissions decision implementing the Utah Access Tariff was not supported by substantial evidence and was therefore arbitrary and capricious and should be set aside.

3. The language of the Commission's Report and Order provides that the Utah Access Tariff is to become effective on

December 1, 1985. Tel-America's actions in filing a petition more than ten days prior to December 1, 1985, should have had the effect of staying the effective date of the tariff pursuant to Utah Code Ann. § 54-7-15 (1986). The Commission's determination that its Report and Order was effective upon issuance effectively precludes any party from taking advantage of the protection provided by Section 54-7-15.

4. The Commission's Report and Order was issued in a generic rule making proceeding and prescribed the Commission's policy with respect to competition, access charges and other telecommunications issues. The Commission's statements were applicable to a general class of persons and fell within the definition of "Rule." The Commission was required to comply with the Administrative Rule Making Act and failed to do so.

ARGUMENT

POINT I

THE COMMISSION FAILED TO MAKE SUFFICIENTLY DETAILED FINDINGS TO APPRISE THE COURT OF THE BASIS FOR ITS DECISION.

The Court has the responsibility to determine whether the Commission acted in a manner which is arbitrary and capricious and therefore without legal justification. To enable the Court to determine whether an order is arbitrary and capricious, the Commission must make findings of fact which are sufficiently detailed to apprise the parties and the Court of the basis for

the Commission's decision. Mountain States Legal Foundation v. Utah Public Service Commission, 636 P.2d 1047, 1051 (Utah 1981).

In the recent case of Milne Truck Lines, Inc. v. Public Service Commission, 720 P.2d 1373, (Utah 1986), the Court reiterated that:

> The Commission cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that the Commission make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached. . . . Without such findings, this Court cannot perform its duty of reviewing the Commission's order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.

Id. at 1378 (emphasis added). See also Mountain States Legal Foundation, supra, 636 P.2d at 1052.

The Commission failed to set forth its findings in its October 29, 1985 Report and Order and February 6, 1986 Order with sufficient detail to apprise the Court of the basis for its decisions. The Commission's Report and Order contains 38 pages of narrative description of the position of the parties, essentially no more than a summary of the testimony. Addendum, Exhibit A. (R. 2677-2713.) The 11 pages containing the Commission's findings of fact and conclusions of law make no attempt to analyze the often conflicting testimony of the participants. (R. 2714-2724). The Commission merely sets

forth in conclusory fashion its determination that "the access tariffs proposed by the local exchange carriers are fair and reasonable and should be adopted" (R. 2721.) and that it "will require access charges based on the non-discounted FCC tariffs." (R. 2725.) The Commission did not articulate any detailed rationale for this conclusion, but merely stated that such a conclusion was required to avoid higher local service costs. (R. 2725.) It made no attempt to provide analysis of the significantly contrasting viewpoints of the participants.

Although there are many examples of deficiencies in the Report and Order which could be illustrated, the following example demonstrates the Commission's failure to discharge its responsibility to give detailed findings. With respect to the issue of whether a discount for FGA and FGB access services should be provided in the Utah Access Tariff, the Commission stated only that the access charges "should be based on the non-discounted interstate access charges implemented by the FCC." (R. 2715.) The Commission failed to give any indication of what it had concluded with regard to the conflicting testimony regarding the need for a discount. It gave no indication that it had weighed the testimony nor did it indicate why the testimony of the proponents of a discount was not persuasive.

Moreover, in its February 6, 1986 Order, the Commission did not elaborate on the basis for its findings in the Report and Order. TRU asserted in its Petition for Review and/or Rehearing that the access charge tariffs approved by the Commission

were unjust, unreasonable, discriminatory and preferential. (R. 2762.) TRU claimed that the Commission failed to investigate the costs of service and rate of return of the proponents of the rate increase and thus could not and did not make a finding as to the justness and reasonableness of the proposed rates. (R. 2764.) TRU claimed that the Commission unlawfully transferred the burden of proof applicable to rate proceedings to the opponents of the rate increase. TRU also claimed that the Commission's findings were conclusory and not supported by evidence. (R. 2764.) Finally, TRU claimed the Commission failed to recognize and analyze the differences between inter- and intra-state FGA, FGB, FGC and FGD services and chose to rely solely on the determinations of the FCC. (R. 2766.)

In response to these assertions, the Commission stated only that it believed it had "fully examined" these issues and that it saw nothing in the petition that persuaded it that its "decisions were in error." (R. 2771.) Once again the Commission failed to articulate a basis for its findings.

The Commission thus never made the detailed findings required to apprise the parties and this Court of the basis for its decision, and for that reason alone, the access tariff established by the Commission must be set aside.

In any event, the evidence before the Commission with regard to the tariff was so inadequate as to make it impossible for that body to have justified its tariff decision, as will be discussed below.

POINT II

IN ESTABLISHING THE ACCESS CHARGE TARIFFS, THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY AND THE UTAH ACCESS TARIFF MUST BE SET ASIDE.

A. The Commission Must Set Rates Which Are Just and Reasonable, i.e., which allows the Utility to Recover its Cost of Services and Realize a Reasonable Return on Investment.

The Utah Public Utilities Act requires that:

> All charges made, demanded or received by any public utility . . . for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful.
>
> * * *
>
> The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the State of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources in energy.

Utah Code Ann. § 54-3-1 (1986). To ensure that rates and charges of utilities are just and reasonable, the legislature has required that rate setting be subject to notice and hearing before the PSC, which is to make the determination that the proposed rate or some other rate meets the "just and reasonable" requirement. Utah Code Ann. § 54-7-12(2) (1986).

The Supreme Court has interpreted these statutory provisions to mean that:

> A just and reasonable rate is one that is sufficient to permit the utility recover its costs of service and a reasonable return on the value of the property devoted to public use.
>
> * * *

> In determining a just and reasonable rate, the gross revenue should be of a sum to cover two distinct components: the operating expense and the return on invested capital.

Utah Department of Business Regulation, Division of Public Utilities v. Public Service Commission, 614 P.2d 1242, 1248 (Utah 1980).

B. There is a Heavy Burden on a Utility to Support its Proposed Rates with Substantial Evidence.

This Court has held that there is a heavy burden on the utility to support its proposed rates and that such support must consist of substantial evidence:

> [T]he mere filing of schedules and testimony in support of a rate increase is insufficient to sustain the burden.

Id. at 1245-46 (footnote omitted). The Court further held that even in an abbreviated proceeding to adjust a utility's rates such adjustment must be based on substantial evidence:

> In turn, this finding must be supported by substantial evidence concerning every significant element in the rate-making components (expense or investment) which is claimed by the applicant as the basis to justify a rate adjustment.

Id. at 1249-50.[30]

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[30] The MFJ similarly provides: Each tariff for exchange access shall be filed on an unbundled basis specifying each type of service, element by element, and no tariff shall require an interexchange carrier to pay for types of exchange access that it does not utilize. The charges for each type of exchange access shall be cost justified in any difference in charge to carriers shall be cost justified on the basis of differences in services provided." United States v. AT&T, supra, 552 F. Supp. at 233.

The Commission itself recognized that the Utah Access Tariff must be based on specific Utah cost data, as did virtually every witness who appeared before the Commission, including witnesses of the proponent, Mountain Bell. Nevertheless, there was no analysis by the Commission of the operating expense; neither was there any testimony presented regarding rate of return on invested capital, and the Report and Order simply failed to address this necessary rate-making component.

C. The Utah Access Tariff Implemented by the PSC was Not Supported by Substantial Evidence as to the Rate Components of Cost of Service and Return on Investment.

Although the Commission recognized that it must set rates that are based on costs it failed to investigate the costs of service and rate of return of the proponents of the rate increase. It therefore was unable to make substantiated findings regarding the reasonableness and justness of the proposed rates. Rather, the Commission, without any factual basis, simply stated that the proposed access rates were "just and reasonable" and adopted the rates as proposed by Mountain Bell and the Independent Carriers.

1. The Report and Order Itself Shows that the Utah Access Tariff Lacked Sufficient Evidentiary Support.

In establishing the Utah Access Tariff, the commission merely concluded in its Findings of Fact and Conclusions of Law that an access charge was needed and that the charge should be

based on the non-discounted FCC interstate access tariff. (R. 2715, 2719, 2723, 2725.) Although testimony at the hearings on this matter was to the effect that the apportionment of NTS cost support was a principal raison d'etre of the Mountain Bell's access charge proposal (see, e.g., R. 0079-80, 1206, 1491), the commission admitted that there was simply no supporting data to make such a determination. Specifically, the commission found that: "Non traffic sensitive costs should be apportioned between all services, but a Utah specific analysis is required for this purpose." (R. 27.) And further,

> 18. The Commission finds that more cost information is required for purposes of appropriately allocating NTS costs to access charges. Utah-specific costs must be developed. The telecommunications task force should examine these issues and make recommendations to the commission regarding them.

Addendum, Exhibit A (R. 2723). As indicated, the court set up a "telecommunications task force" which had among other things the specific duty of studying and presenting to the PSC the issue of "Utah-specific costs to be included in access charges." (R. 2725.)

Although the PSC's Findings of Fact and Conclusions of Law with regard to implementation of the access charge tariff are by its own admission unsupported by Utah specific data its conclusion that no such data exists is abundantly supported in the record. The evidence presented to the PSC and its own

conclusions demonstrate that its order implementing the Utah Access Charges based on the FCC non-discounted Tariff is arbitrary and capricious and beyond its statutory authority.

2. There was No Substantial Evidence That the FCC Tariff Rates, on which the PSC Based its Utah Access Tariff, were Supported by Cost Data Applicable to Utah.

As discussed above, the tariff proposed by Mountain Bell and the Independent Carriers mirrored the FCC Tariff, with the exception that it provided no discount for inferior quality FGA and FGB as did the FCC Tariff. The reason for basing the Utah proposal on the FCC Tariff was explained by Thomas A. Garcia, testifying for Mountain Bell:

> The fact of the matter is we don't have the cost support for Utah specific to be able to do it today, and in lieu of having that we would advocate using national based costs which essentially portray an allocation of NTS costs at the national level, that we would like to have continued within the State of Utah.

(R. 0084.) The witness went on to say, however, that the allocation of NTS costs between interstate and intrastate jurisdictions was extremely complex and that whether intrastate costs are directly a function of interstate costs was a matter of considerable uncertainty which had not been resolved at the federal level. (R. 0085.) In fact, Mr. Garcia testified that in order to compare the level of Mountain Bell's own contribution to NTS costs in its toll rates with the contribution of carriers under the proposed access charges, it would be "absolutely" necessary to have Utah specific cost studies, which were not then available. (R. 0127.)

necessary to make the decision as to how to allocate NTS costs among the various users of the system in terms of access charges would involve local loop costs, NTS costs, NTS costs interstate and their residual effect on an intrastate basis, and a determination as to how those costs would be recovered as between the local exchange customer and the competing carriers, including Mountain Bell. (R. 0171.) Again, this data was simply unavailable and not before the commission.

The cost data on which the FCC based its access tariff was frequently referred to in testimony before the Commission, but was not itself included in the PSC record on this matter. Perhaps for that reason and because Utah cost data was unavailable, the testimony which attempts to correlate the national cost data with Utah costs is weak and essentially speculative. Mr. Lloyd I. Tanner of Mountain Bell was questioned about the possible effect of future Utah-specific cost data on a tariff based on the FCC rates:

Q. The format would be the interstate format?

A. It would be the format that we have filed in this proceeding.

Q. But the rates would be specific to Utah costs?

A. That's correct.

Q. And right now we cannot say whether those costs are going to make these rates lower or higher or that they will vary in different areas of service, correct?

A. I cannot say.

Q. So that we're really going to have a major overhaul if we ever get a determination of state specific costs?

A. That's possible. Our feeling is that . . . the costs in Utah will not be significantly different than the costs on a nationwide basis.

Q. We don't know that because we haven't gotten any Utah specific studies?

A. That's correct.

Q. So right now we're proposing one short-term interim for another short-term interim [the Bulk Billing Tariff].

A. Looking at it that way, that is correct.

(R. 0246-47.) Mr. Tanner further testified on this issue are as follows:

Q. In making the proposal you are unable, therefore, to testify on behalf of your company that if these rates are put into effect as you have suggested, that the Company will in fact cover their revenue requirement incurred as a result of offering the services proposed by the tariff?

A. The cost studies [supporting the FCC tariff] were based upon a nationwide figure and I can represent to you that that figure is our feeling in Mountain Bell that our costs will not be significantly different from that; therefore, we feel that they will be near our costs and that's the reason we've asked to keep the docket open to proceed to develop Utah specific costs.

(R. 0290). Mr. Tanner's justification for imposing a tariff without more substantial supporting data is simply that "we have a number of providers of service within the State of Utah and they have no tariff at all, and this will meet that requirement." Id. However, Mr. Tanner further testified that in response to the future development of Utah's specific costs:

. . . There may be an adjustment at some of the rate levels.

Q. But you did agree with him, did you not, that this could be a significant overhaul?

A. I think my testimony . . . is, I really don't know the magnitude or level.

Q. That's right. In other words, all that Mountain Bell is offering right now is the corporate feeling that it would not be a major overhaul; is that correct?

A. Well, as I've indicated, we really don't know at this point. Our feeling is that the costs in Utah specifically will be something close to what has been used in the interstate jurisdiction.

Q. But it could be different?

A. I don't believe I could argue with you if someone were to purport that it would be significantly different because we don't have the * * * cost to base it on.

* * *

A. We haven't developed specific costs to understand or to be able to represent that we have Utah specific rate levels or costs to develop rate levels.

(R. 0306-307.)

Gary Hinton, a witness for the Division made perhaps the strongest assertions in support of the adoption of the Mountain Bell tariff proposal although without stating how he had arrived at his conclusions or presenting any underlying data:

A. The FCC approved the interstate tariffs based on an analysis and acceptance of cost support information that was filed by carriers and the National Exchange Carriers Association, so we have a certain degree of confidence on a national level.

* * *

On the intrastate basis, we, as I have indicated previously, we do not have intrastate costs to be able to verify whether there should be parity or whether there could be an increase or possibly a decrease of the access service rates for the intrastate tariffs.

We believe, though, that it is appropriate at this time, the extent that we have outlined, to adopt an intrastate access service tariff that is at parity with the interstate tariffs based on the understanding that it is . . . unlikely that there is going to be a significant [or] major differential between the national average costs and the Utah costs at this time.

Q. And how do you come to that conclusion?

A. . . . In the cost-support information that has been filed by Mountain Bell in comparison with the national average - and this is for NTS costs, not for traffic-sensitive costs - Mountain Bell has been, at least on a percentage basis, has been documented by the FCC staff and by NECA as being approximate to the national average. That's for Mountain Bell, not for the independents. That gives us one assurance that the NTS costs are approximate to the interstate average.

Q. Is that just Mountain Bell's Utah data or is that Mountain Bell system data?

A. That's Mountain Bell Utah data. Mountain Bell, as do all carriers that operate in multiple states, filed cost support data with NECA, . . . on a study area basis which breaks down roughly state boundaries.

* * *

Q. Would it be fair to say that in fact at this point, Mountain Bell has represented that they do not yet have cost data to support the level of rates which they are proposing?

A. As I have indicated previously, there is not specific Utah cost data that supports the rate levels that are in these tariffs and that is why we have recommended a further proceeding in development of cost studies.

(R. 1670-71.)

Although Mr. Hinton states his conclusion that interstate cost data and Mountain Bell's Utah cost data are close, it amounts to a bare assertion on his part about data, as he

certainly did not present to the Commission the data on which he bases his conclusions. In fact, he seems to contradict the testimony of Mountain Bell's own witnesses that there was neither present nor historical Utah-specific cost data available nor any methodology to develop them. His rather vague assertions therefore, amount to little more than the "feeling" expressed by Mountain Bell witnesses that the FCC rates might be near Utah costs, when Utah costs are developed in the future, and should perhaps be viewed in light of his earlier testimony:

> Q. Would you agree that regardless of where the Commission sets the rate on the feature group A, assuming they allow intrastate competition, that wherever they set that it would be somewhat arbitrary because we don't have the cost studies to - to establish where they should be set?
>
> A. At this time, yes.
>
> Q. So, to the extent that those were arbitrary and eliminated the resellers from the market, that may not be justified on a cost basis?
>
> A. If they are set on an arbitrary basis they are not based on costs, that's true.

(R. 1638.)

Thus, Mountain Bell's proposed access charge tariff is based on Mountain Bell's "feeling" that the NTS cost data in Utah will approximate the cost basis on which the FCC tariff was based; how near or "approximate" is not further defined. Virtually no data is presented which shows the cost basis for the FCC Tariff or Mountain Bell's input into that data base, much less any Utah-based data which would allow the commission

to compare Utah costs with the national costs so as to determine whether the FCC access charge was "just and reasonable" within the Utah context.

Although testimony described above concerns the cost component of rate making, two Utah cases involving a review of PSC determination of rates of return provide a useful comparison. In Utah State Board of Regents v. Utah Public Service Commission, 583 P.2d 609 (Utah 1978), the Commission was asked to allow Utah Power & Light Company to include construction work in progress in the rate base, which the Commission concluded was proper. The Commission, however, denied Utah Power & Light Company's request for a fractional increase in its percentage rate of return and instead found it "reasonable" to adopt the lower rate of return which had been determined in an Order issued a year previously. This Court held that "[t]he Commission's adoption of a nearly one-year old prior determination of rate of return, inferring 'we have already decided that issue' is deemed to be an abuse of authority." Id. at 611. The Court stated that in the face of a challenge to the current validity of the prior rate of return determination the Commission should have taken evidence as to existing financial conditions. Although the Court recognized that the Commission might, after hearing such evidence, reach the same conclusion, it found that "to totally ignore the possibility of significant changes of circumstances, or to assume there has been none must be viewed as error." Id.

Similarly, in the instant case the Commission has adopted a prior decision of the FCC essentially on the basis that "the FCC has "already decided that issue." The Commission has ignored the possibility of significant differences in circumstances between the national data on which the FCC decision was based and unavailable Utah data. Under such circumstances, it is not justifiable for the PSC to assume that there are no significant differences, especially when none of the national data on which it apparently relied was part of the record before it.

Further, in Utah Department of Business Regulation, Division of Public Utilities v. Public Service Commission, 614 P.2d 1242 (Utah 1980), Mountain Fuel witnesses testified that its net income and rate of return would not be increased by the rate increase which it proposed and which was approved by the PSC. Like the instant case, a witness for the company had testified that "he did not believe the further study of any factors was needed", that "it was his understanding revenues had not changed from the test period" in a previous case, that he "had an impression that usage was close to past forecast test years," and that the company "had estimated" and he "felt" that there had been an increase of costs and that the requested increase in rate was directly offsetting. Id. at 1244 (emphasis in the original). The Court noted that testimony, including that referred to above, presented as supporting the requested rate relief was "not supported by any cost of service

study or other statistical evidence to sustain the bald assertions that all relevant factors in the rate-making process would remain constant under the future projections." Id. at 1246. The Court considered particularly significant that there was no evidence presented as to the data upon which was based a witness's testimony that rate of return had been diminishing. Id. The Court in this regard quoted State v. Jager, 537 P.2d 1100, 1113-1114 (Alaska 1975) as follows:

> . . . Some deference to management judgment is, of course, proper. The Commission may not however defer to bald assertions by management. This is so particularly when more compelling evidence, in the form of economic and statistical analysis and comparisons of the type which can be committed to record and be available for analysis by the Commission and by a reviewing court, can be developed at reasonable cost. . . .

Likewise, in the instant case the evidence before the Commission and on which it must have based its decision consisted of little more than the feelings, impressions and "bald assertions" of Mountain Bell and other witnesses. There was ample testimony before the Commission that the type of statistical and economic data which could "be committed to record and be available by analysis by the Commission and by a reviewing court" could be developed and was being developed. Many witnesses, in fact, urged the Commission to wait until such Utah-specific data was available to implement the Utah Access Tariff. (See, e.g., R. 0742-43, 0946-48, 1225.) Without such data, the Commission's decision implementing the Utah Access Tariff in this matter was at best premature and cannot be upheld.

3. There was No Evidence and No Finding By the Commission as to the Effect of the Utah Access Tariff on Mountain Bell's or the Independent Companies' Authorized Rate of Return.

As discussed above, the second component of a just and reasonable rate is the return on invested capital Department of Business Regulation v. PSC, supra. One of the principal reasons for Mountain Bell's proposal that the PSC recognize the existence of and regulate intra-state toll competition and implement an access tariff was Mountain Bell's perceived need to acquire a source of new revenue to replace revenue being lost from a combination of two causes. First, the Company claimed to have revenue "at risk" from its own intra-LATA toll services due to the de facto existence of competitors who were reducing Mountain Bell's former 100% market share in that area. (R. 0316-18.) Second, as discussed above, this competition was presumably occurring through use of interstate access provided under the FCC Tariff to make intra-LATA calls, with the costs and revenue from such competition booked to the interstate rather than the intrastate jurisdiction. (See, R. 0265-67.) This misallocation was claimed by Mountain Bell to adversely affect NTS cost support allocation within the state. (See, e.g., R. 1873.)

There was testimony to the effect that the implementation of the access tariff would increase Mountain Bell's revenues. (See, e.g., R. 1674-75.) There was also testimony by Mr. Tanner of Mountain Bell that the effect on Mountain Bell's revenues from intra-LATA competition would be a five million

dollar loss and that the mirroring of the FCC non-discounted Tariff was designed by Mountain Bell to offset this loss. (R. 320-24.) When it was pointed out to Mr. Tanner that the original five million dollar loss was now projected in subsequent testimony to be only one million dollars, he simply stated that:

> **A.** As I indicated to you, the rate was based upon cost support presented to the FCC and our company, which is Mountain Bell, part of which is represented by Utah and provided Utah data, those rates were accepted by the FCC and subsequently a discount was ordered at the rate of 55% until such time as equal access was implemented. It is our feeling that we want to be able to protect those revenues and at the same time recover at the level that has been supported, at least on a national level, and subject to the - as we have proposed in this hearing, the continuation of this docket to develop specific cost data for the State of Utah.
>
> **Q.** The only figure we have to work on at the present time is a $1 million potential revenue loss, though. The rest of it is just conjecture at this point.
>
> **A.** Well, I think that's what I've indicated in my testimony.
>
> * * *
>
> **Q.** . . . [A]ssuming for a moment that $1 million is at risk, shouldn't we take the discounted rate and simply increase that to a level that would protect that $1 million as opposed to going to the full premium [non-discounted] rate at this time until we can get those cost-based studies.
>
> **A.** Our proposal would be that we would implement the full rate as we have proposed and that any advantage or windfall that the company might experience as a result of that, should there be any, that that would be reflected in local rates or in some other method at the discretion of this Commission.

(R. 334-35.) Mr. Tanner later testified that Mountain Bell had no idea as to "what kind of revenues we might experience", that

no different rates from those proposed had been tested as to the revenue effect and that "all we are doing is mirroring the FCC rate." (R. 0340-42.)

Thus, the revenue to be gained from the imposition of the FCC tariff is not known, the amount of revenue needed to offset revenue losses due to competition is uncertain and the NTS costs against which that revenue would be matched to produce a rate of return are also not known. The PSC, therefore, had no evidence before it on which it could base any conclusion as to what Mountain Bell's overall rate of return would be after the imposition of the Utah Access Tariff rates and whether that rate of return was more or less than the 14.75% allowed (R. 1615.) Such a calculation was to be left to a further rate proceeding which might or might not occur. (See R. 1674-76.)

Perhaps because of the dearth of substantial evidence, the Commission's Report and Order contained no findings of fact regarding the effect of the Utah Access Tariff on Mountain Bell's and the independent carriers' rate of return. The Commission thus failed to hear evidence or make findings necessary to support its conclusion that the Utah Access Tariff was just and reasonable and the Tariff must be set aside by this Court. See, Utah Department of Business Regulation, supra; Utah State Board of Regents, supra.

POINT III

THE COMMISSION ERRED IN CONCLUDING THAT THE REPORT AND ORDER WAS EFFECTIVE WHEN ISSUED AND THAT THE STAY PROVISION OF UTAH CODE ANN. § 54-7-15 DID NOT OPERATE TO SUSPEND THE EFFECTIVE DATE OF THE ACCESS TARIFF.

Paragraph One of the Report and Order stated "[t]he access charge tariffs . . . are hereby approved as modified in the Findings of Fact, to be effective as of December 1, 1985, or as soon thereafter as practicable." (R. 2724)

On November 18, 1985, TRU filed a Petition for Review and/or Rehearing which the Commission denied on February 6, 1986, Mountain Bell thereafter requested the Commission to clarify the effective date of the Report and Order. (R. 2779.) This request for clarification arose out of Tel-America's response to Mountain Bell's request for usage and billing information wherein Tel-America took the position that its filing of an Application for Review and/or Rehearing had suspended the effective date of the Utah Access Tariff in accordance with Utah Code Ann. § 54-7-15 (196), pending the Commission's decision.

On March 7, 1986, the Commission issued a subsequent Order purporting to clarify the effective date of the Report and Order. (R. 2804.) The Commission took the position that the various petitions for review and/or rehearing filed on November 14, and 18, 1985 did not have the effect of suspending, pending grant or denial of the applications, the implementation of the access tariffs approved by the Commission October 29th Report and Order. Although the Report and Order stated that the

access tariffs were to be effective on December 1, 1985, the Commission found that the Report and Order was effective upon issuance. (R. 2807.) Therefore, the Commission found that the petitions for review and/or rehearing were not filed "ten days or more before the effective date of the order as to which review or rehearing is sought" (Utah Code Ann. § 54-7-15 (1986)) and concluded that Section 54-7-15 did not operate to suspend the effective date of the tariffs. (R. 2807.)

Utah Code Ann. § 54-7-15 (1986) provides that any application for review or rehearing made ten days or more before the effective date of the order shall either be granted or denied before the effective date or shall have the effect of staying the effective date until the application is granted or denied. Since the language of the Report and Order states that the effective date of the tariffs was December 1, 1985, Tel-America's actions in filing a petition for review and/or rehearing on November 18, 1985 should have had the effect of staying the effective date of the tariff. The Commissions's determination that the Report and Order was effective upon issuance effectively precludes any party from taking advantage of the protection provided by Section 54-7-15. The Legislature cannot have intended that such a procedural safeguard be subject to nullification merely by the Commission's assertion that its orders are effective upon issuance.

The Commission ignored its own rules and regulations in determining that the Report and Order was effective upon issuance. Section 18.3 of the Commission's Rules of Practice

and Procedure states that an order of the Commission ". . . shall of its own force take effect and become operative twenty (20) days after the service thereof, unless otherwise provided in such order." See also Utah Code Ann. § 54-7-10(2) (1986). Administrative regulations are presumed to be reasonable and valid and cannot be ignored or followed by the Commission to suit its own purposes. "Such is the essence of arbitrary and capricious action. State of Utah v. Utah Merit System Council, 614 P.2d 1259, 1263 (Utah 1980). The Utah Access Tariff, if upheld by this Court, should therefore be held to have an effective date of February 6, 1986 when the Commission denied the application for review and/or rehearing and not December 1, 1985 as determined by the Commission.

POINT IV

THE COMMISSION FAILED TO COMPLY WITH THE ADMINISTRATIVE RULE MAKING ACT.

This case was instituted as a generic rule making proceeding pursuant to a petition filed by the Division of Public Utilities. (R. 1883.) The Commission's first orders issued in this case makes clear that it considered the nature of this proceeding to be a generic one to consider numerous issues involving the telecommunications industry. (R. 1887, 1893-1897.)

The Commission's Report and Order prescribed the policy of the Commission with respect to Competition, access charges for Intrastate Inter-LATA and Intra-LATA telephone services and other telecommunications issues and otherwise implemented or interpreted the Commission's policies. These statements of the

Commission, applicable to a general class of persons, fall within the Administrative Rule Making Act's definition of "Rule." Utah Code Ann. § 63-46a-2(8)(a) (1986). Rulemaking is required when agency actions affect a class of persons. Utah Code Ann. § 63-46a-3 (1986). The Commission's Report and Order affects several classes of persons; e.g., the class of telecommunications resellers, the class of telecommunications resellers' customers and the class of interexchange carriers.

The Commission, however, failed to comply with the Administrative Rule Making Act. The Commission was required to make its proposals with respect to Intrastate Inter-LATA and Intra-LATA access charges available to the public prior to implementation by filing them with the Office of Administrative Rules. The Commission's proposals should then have been published in the Utah State Bulletin and the Commission should have allowed 30 days for public comment. Utah Code Ann. § 63-46a-4(2) (1986).

In Williams v. Public Service Commission of Utah, 720 P.2d 773 (Utah 1986), the Utah Supreme Court held that the Commission failed to adhere to the Requirements of the Administrative Rule Making Act. In Williams, the Commission was required to proceed by formal rule-making since its decision was generally applicable and interpreted the scope of the Commission's statutory regulatory powers. Id. at 776. The Court held that the Commission failed to give notice to nonparties of the Commission's intentions. Likewise, in this case, the Commission has failed to provide the notice contemplated by the Administrative Rule Making Act.

Tel-America requested that the Commission reopen the proceeding to allow for public comment on the intrastate inter-LATA and intra-LATA proposals which the Commission failed to do. (R. 4428.) As a result of the Commission's failure to comply with the Administrative Rulemaking Act, the Commission's October 29, 1985 Report and Order could not take effect.

CONCLUSION

Based upon the foregoing, Petitioners respectfully request that the Court set aside the decisions of the Public Service Commission of Utah establishing an intrastate intra-LATA and inter-LATA access charge tariff both for failure to comply with the Administrative Rulemaking Act and because the Commission exceed its authority in implementing the rates contained in the Utah Access Tariff which were not supported by substantial evidence as to cost and rate of return.

If this Court upholds the Utah Access Tariff, it should rule that its effective date was February 6, 1986 and not December 1, 1985, on the basis that the Order as to tariffs was stayed pending resolution of the Petitioner's Application for Reconsideration.

Respectfully submitted this 2d day of February, 1987.

SNOW, CHRISTENSEN & MARTINEAU

By 

Stephen Roth
Stanley K. Stoll
Jerry D. Fenn
Attorneys for Petitioners

SCMJDF37

ADDENDUM

ADDENDUM

PART ONE: STATUTORY PROVISIONS

§ 54-3-1 Utah Code Ann. (1986)

All charges made, demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, shall be just and reasonable. Every unjust or unreasonable charge made, demanded or received for such product or commodity or service is hereby prohibited and declared unlawful. Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and the public, and as will be in all respects adequate, efficient, just and reasonable. All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well-being of the State of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy.

§ 54-7-12(2) Utah Code Ann. (1986)

(2) Any public utility that proposes to effect a rate increase shall file appropriate schedules with the commission setting forth the proposed rate increase. The commission shall, either upon complaint, or upon its own initiative without complaint, after reasonable notice, hold a hearing to determine whether the proposed rate increase, or some other rate increase, is just and reasonable. Except as otherwise provided in Subsections (3) and (6), no proposed rate increase is effective until after completion of the hearing and issuance of a final order by the commission with respect to the proposed increase.

§ 54-7-15 Utah Code Ann. (1981)

Before any party, stockholder, bondholder, or other person pecuniarily interested in the public utility who is dissatisfied with an order or decision of the commission may commence legal action, the aggrieved party or person shall first proceed as provided in this section.

(1) After any order or decision has been made by the commission any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for review or rehearing in respect to any matters determined in said action or proceeding specified in the application. The applicant shall make application to the commission for review or rehearing within 20 days after the issuance date of the order or decision. The application shall set forth specifically the grounds on which the applicant considers such decision or order to be unlawful. No applicant shall in any court urge or rely on any ground not set forth in the application. Any application for review or rehearing made ten days or more before the effective date of the order as to which review or rehearing is sought shall be either granted or denied before such effective date, or the order shall stand suspended until the application is granted or denied. Any application for review or rehearing made within less than ten days before the effective date of the order as to which review or rehearing is sought, and not granted within 20 days, may be taken by the party making the application to be denied, unless the effective date of the order is extended for the period of the pendency of the application. If any application for review or hearing is granted without a suspension of the order involved, the commission shall forthwith proceed to dispose of the matter with all dispatch and shall determine the same within 20 days after final submission, and, if such determination is not made within said time, it may be taken by any part to the review or rehearing that the order involved is affirmed. An application for review or rehearing shall not excuse any corporation or person from complying with and obeying any order or decision or with any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except as herein otherwise provided, and except in such cases and upon such terms as the commission may by order direct.

(2)(a) The commission upon receipt of an application for review shall, after review, proceed to grant or deny the

application. If the application is granted, the commission shall review the entire record on matters covered in the application and shall affirm, abrogate, change or modify the original order or decision as it deems proper.

(b) If the application is for rehearing, the commission, after review of the entire record on matters covered in the application, may either grant the application or determine that there is insufficient reason to grant a rehearing, in which event, it shall deny the application, but it may affirm, abrogate, change, or modify its original order or decision as it deems proper. If a rehearing is granted, the commission, after rehearing and after considering all the facts including those arising after the original order or decision, shall affirm, abrogate, change or modify its original order or decision as it deems proper.

(c) Any order or decision which abrogates, changes, or modifies an original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

§ 54-7-16 Utah Code Ann. (1986)

Within thirty days after the application for a rehearing is denied, or, if the application is granted, within thirty days after the rendition of the decision on rehearing, the applicant or any party to the proceeding deeming himself aggrieved by such order or decision rendered upon rehearing may apply to the Supreme Court for a writ of certiorari for the purpose of having the lawfulness of the original order or decision, or the order or decision on rehearing, inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the commission to certify its record in the case to the court. Immediately after the service of the writ the commission shall cause notice of the pendency of the writ to be served upon each party to the action or proceeding in which the order or decision was rendered in the manner provided by § 54-7-9. On the return day the cause shall be heard by the Supreme Court, unless for good reason shown the same is continued. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified by it. The review shall not be extended further than to

determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of Utah. The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. The commission and each party to the action or proceeding before the commission shall have the right to appear in the review proceedings. Upon the hearing the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the commission. The provisions of the Code of Civil Procedure [Rules of Civil Procedure] relating to writs of review shall so far as applicable and not in conflict with the provisions of this chapter apply to proceedings instituted in the Supreme Court under the provisions of this section. No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the commission, or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

§ 63-46a-2(8)(a) Utah Code Ann. (1986)

(8) (a) "Rule" means a statement made by an agency that applies to a general class of persons, rather than specific persons and: (i) implements or interprets policy made by statute; or (ii) prescribes the policy of the agency in the absence of express statutory policy; or (iii) prescribes the administration of the agency's functions or describes its organization, procedures, and operations. "Rule" includes the amendment or repeal of an existing rule.

§ 63-46a-3 Utah Code Ann. (1986)

(1) Each agency shall maintain a complete copy of its current rules and make it available to the public for inspection during its regular business hours.

(2) Each agency shall make rules to fulfill the purposes of this chapter.

(3) Rulemaking is required when:

(a) agency actions affect a class of persons;

(b) agency actions affect the operations of another agency; or

(c) statutory or federal mandate requires rules.

(4) Rulemaking is not required when:

(a) a procedure or standard is already described in statute;

(b) agency action affects an individual person, not a class of persons;

(c) agency action applies only to internal agency procedures; or

(d) grammatical or other insignificant rule changes do not affect agency policy or the application or results of agency actions.

(5) Each agency may incorporate by reference applicable federal and professionally recognized uniform code rules, if the agency:

(a) incorporates by reference federal and uniform rules, and all future changes in them, under the procedures of this chapter;

(b) states specifically in its rules which federal and uniform rules are incorporated by reference, and any agency deviation from them; and

(c) maintains complete and current copies of federal and uniform rules incorporated by reference, both at the agency and at the Office of Administrative Rules, available for public inspection.

(6) The state attorney general shall provide agencies any assistance to ensure agency rules are legally sound.

§ 63-46a-4 Utah Code Ann. (1986)

(1) When making, amending, or repealing a rule, agencies shall comply with this section, consistent procedures required by other statutes, applicable federal mandates, and rules made by the office to implement this chapter, except as provided in §§ 63-46a-6 and 63-46a-7.

(2) Each agency shall file its proposed rule and rule analysis form with the office. Rule amendments shall be marked, with new language underlined and deleted language interlined. The form and proposed rule, unless the rule is too long as determined by the office, shall be published in the next issue of the bulletin.

(3) The rule analysis form shall contain:

(a) a summary of the rule or change;

(b) the purpose of the rule or reason for the change;

(c) the statutory authority or federal requirement for the rule;

(d) the anticipated cost or savings to the state budget and compliance cost for affected persons;

(e) how interested persons may inspect the full text of the rule;

(f) how interested persons may present their views on the rule;

(g) the time and place of any scheduled public hearing;

(h) the name and telephone number of an agency employee who may be contacted about the rule; and

(i) the signature of the agency head or designee.

(4) A copy of the rule analysis form shall be mailed to all persons who have made timely request of the agency for advance notice of its rulemaking proceedings, and to any other person who, by statutory or federal mandate, or in the judgment of the agency, should also receive notice.

(5) Following the publication date, the agency shall allow at least 30 days for public comment on the rule. During the public comment period the agency may hold a hearing on the rule.

(6) Except as provided in §§ 63-46a-6 and 63-46a-7, a proposed rule becomes effective on any date specified by the agency which is no fewer than 30 nor more than 90 days after the publication date. The agency shall provide written notification of the rule's effective date to the office. Notice of the effective date shall be published in the next issue of the bulletin.

ADDENDUM

PART TWO: PUBLIC SERVICE COMMISSION ORDERS

Exhibit A - October 29, 1985 Report and Order in Case No. 83-999-11

Exhibit B - February 6, 1986 Order

Exhibit C - March 7, 1986 Order

Exhibit D - May 1, 1986 Order Denying Petition for Review and/or Rehearing of Tel-America.

Exhibit E - June 24, 1986 Order Denying Petition for Review and/or Rehearing of Tel-America

Tab A

DOCKETED

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of Access Charges for Intrastate Inter-LATA and Intra-LATA Telephone Services.	CASE NO. 83-999-11 REPORT AND ORDER

ISSUED: October 29, 1985

Appearances:

David E. Salisbury Ted D. Smith	For	The Mountain States Telephone and Telegraph Co.
Michael Ginsberg Mark C. Moench Assistant Attorneys General	"	Division of Public Utilities
Brian W. Burnett Assistant Attorney General	"	Committee of Consumer Services
Randy L. Dryer Ruth Baker-Battist	"	MCI Telecommunications Corp.
Stuart L. Poelman Richard C. Ehnert	"	AT&T Communications of the Mountain States
A. Robert Thorup Ann C. Pongracz	"	GTE-Sprint Communication Corp.
Brinton R. Burbidge James J. Cassity	"	Utah Independent Exchange Carriers
John W. Horsley	"	Continental Telephone Co.
Bryan McDougal	"	Telecommunications Resellers of Utah
Kay M. Lewis	"	Mobile Telephone, Inc. and Mobile Telephone of Southern Utah, Inc.

By the Commission:

This matter was heard by the Public Service Commission of Utah (Commission) on November 14-17, 19-21 and December 4-7, 1984 in Salt Lake City, Utah.

I. BACKGROUND OF THE PROCEEDING

This matter was initiated as a generic proceeding in the latter part of 1983. In its Order dated December 21, 1983, the Commission ordered that two bulk-bill tariffs be placed into effect by which Mountain States Telephone and Telegraph Co. (Mountain Bell) and the Utah Independent Exchange Carriers in Utah (UIEC) would bill AT&T Communications for access to complete intrastate inter-LATA calls. The tariffs went into effect on January 1, 1984. The Commission noted in its Order that the bulk-bill arrangement was a short-term solution until more definitive access tariffs could be placed into effect.

Thereafter, by Order dated June 1, 1984, the Commission ordered that this matter proceed to consideration of definitive access services tariffs to replace the bulk-bill arrangement. In addition, the Commission outlined several issues relating to the nature of intrastate intra-LATA competition, and the extent to which it would be allowed in the state of Utah. These issues were:

A. Should the Commission authorize intrastate intra-LATA competition by Specialized Common Carriers (SCC's) for message telecommunication services?

B. What impact would intra-LATA competition by SCC's have on Mountain Bell's, and the independent telephone companies' revenues from message telecommunication services?

C. What revisions to Mountain Bell's intra-LATA message

telecommunication service rates would be required for Mountain Bell to remain competitive with the SCC's?

D. Would the approval of intrastate intra-LATA competition by the SCC's for message telecommunication services require the establishment of intra-LATA carriers access charges? If yes, how should the intra-LATA carriers access charges be structured? How should the intra-state allocation of non-traffic sensitive costs be apportioned between the inter-LATA carriers access charges, intra-LATA carriers access charges, intra-LATA message telecommunication service and wide area telecommunication service rates and the rates for local exchange services?

E. Should Mountain Bell and the independent telephone companies be allowed to provide ancilliary services (billing services, recording services, directory assistance service, security investigative services, and testing services) to SCC's that compete for intra-LATA message telecommunication services?

F. What are Mountain Bell's plans and time schedules to provide equal exchange access to all SCC's for inter-LATA message telecommunication services? When will pre-subscription to the interexchange carriers be initiated by Mountain Bell? Will the equal access connections allow Mountain Bell or the SCC's to prevent the SCC's customers from using their system for intra-

LATA telecommunication services?

G. Should the Commission set a specific intrastate usage limitation for SCC's below which they could continue to operate without a Certificate of Convenience and Necessity and tariffs?

H. What standards should the Commission use to affirm the fitness of an SCC to receive a Certificate of Convenience and Necessity to operate as an intra-LATA carrier? On what basis should the Commission approve rates and tariffs for SCC's providing intra-LATA message telecommunication services? Should the Commission forbear from regulating rates, requiring tariffs or applying any of its existing rules and regulations for an SCC providing intra-LATA message telecommunication services? Should the Commission establish any new regulatory requirements for an SCC providing intra-LATA message telecommunication services?

I. Should SCC's be required to provide ubiquitous intra-LATA message telecommunication services?

J. Should Mountain Bell be designated as the "preference carrier" for intra-LATA message telecommunication services?

K. Should Mountain Bell be designated as the "carrier of last resort" for intra-LATA message telecommunication services?

L. If intra-LATA competition is not authorized, should the Commission require interstate SCC's to install equipment to block intra-LATA message telecommunication service?

The access tariff and intra-LATA competition issues were set for hearing and filing dates for tariffs and testimony were established by the Commission. Hearings commenced on November 13, 1984. Twenty-five witnesses presented testimony to the Commission.

II. POSITIONS OF THE PARTIES

A. Identification of Witnesses

Mountain Bell presented the direct and rebuttal testimonies of Mr. Thomas A. Garcia, Mr. W. Mack Lawrence, Mr. Lloyd I. Tanner, Mr. Timothy F. Young, Mr. Joseph S. Kraemer, Mr. Gerard J. Boschen and Mr. James L. Baker. The Division of Public Utilities (Division) presented the direct testimony of Mr. Cary B. Hinton. Continental Telephone Company of the West (Continental) presented direct and rebuttal testimony of Mr. Paul Montsinger. The Utah Independent Exchange Carriers (UIEC) presented the testimony of Mr. Perry A. Arana. AT&T Communications (AT&T) presented testimony of Dr. Merrill J. Bateman, Mr. W. Lester Johnson, and Mr. James Hansen. Mr. Jackie N. Dukes testified on behalf of Navajo Communications (Navajo). MCI

Telecommunications (MCI) presented the testimony of Mr. Warren L. Liss and Mr. Steven R. Brenner. The Telecommunication Resellers of Utah (TRU) offered direct and rebuttal testimony of Mr. Jerry Dyer. The Committee of Consumer Services (Committee) presented the testimony of Dr. Joseph Ingles. Seven public witnesses testified.

Access Charge Tariffs were filed by Mountain Bell and the Utah Independent Telephone Companies containing proposed rates for connection by interexchange carriers, either through reselling of other telephone services or by interexchange facility carriers, to the local networks. The Tariffs also provided for the billing of interexchange carriers' services and the termination of local service for nonpayment of all amounts billed. The Tariffs proposed by the local exchange carriers mirror the interstate access tariffs in effect at the time, with some exceptions. Mountain Bell's exceptions were as follows: no discount for Feature Groups A and B (FGA & FGB), reporting and auditing, restructure of FGA-FX service to the local calling area, directory assistance, end-user common line charge at this time, and denial of local service for nonpayment of toll charges. The Independent Exchange Carriers exceptions, in addition to those requested by Mountain Bell, delete the requirement of providing certain services when technical restrictions prevent providing the services options, allowing FGA customers access limited to the local access area, and the Billing and Collections mirror the National Exchange Carrier Association (NECA) tariff.

In addition to the tariffs, testimony was received on competition, whether the Commission should limit regulation to facilitate the movement to competitive markets, the threat of by-passing the switched network, universal service, and the cost of providing the interconnect service.

B. Access Charge Tariff

Tariffs for intrastate services were presented by Mountain Bell and the UIEC. These tariffs are to facilitate the interconnection of interexchange carriers from one exchange to another. The differences in the tariffs are due to the abilities of the companies to provide the required connections requested by the interexchange carriers. The tariffs set forth the rates and services that will be offered by the local exchange carriers. These services include Switched Access Services, Special Access Service, Billing and Collection Service, and Miscellaneous Services. Switched Access Services are designated Feature Group A, B, C, and D connections which are similar to the interstate tariffs approved by the Federal Communications Commission (FCC). The Feature Groups are equal to the Exchange Network Facilities for Interstate Access (ENFIA) connections which were used to provide intrastate and interstate toll services. Special Access Services deal with non-switched services which are not available at this time. Billing and Collection Services would allow the local exchange carrier to do the billing and collection for SCC's similar to what is provided to AT&T. This service would include

the right to terminate local service for nonpayment of long distance toll bills since the accounts of the SCC's would be purchased by the local exchange carrier. Miscellaneous Service includes special routing, additional engineering and labor, testing services and any specialized or additional arrangements needed to provide the services in this tariff.

The proposed access services tariff also differed from the interstate tariff in the following areas:

(1) WATS and 800 services are limited to a shared use basis.

(2) The deposit and credit policies contained in the Utah Mountain Bell General Exchange Tariff replace those contained in the interstate tariff; and

(3) Access services would be restricted to interexchange carriers including resellers;

UIEC's intrastate inter-LATA tariffs basically mirror the intrastate inter-LATA and intra-LATA tariffs developed by Mountain Bell except for the tariff sections dealing with Switched Access Services and Billing and Collection Services.

The Division supported, in general, the revisions to the interstate access services tariffs that were proposed by Mountain Bell and by the UIEC.

Testimony of the parties on the access services tariffs issues are as follows:

1. Feature Groups A, B, C & D

No Discounts for Feature Groups A and B. Feature Groups A and B (FGA, FGB) are proposed connections for SCC's and Resellers to receive and complete intrastate inter- or intra-LATA calls over the local network. FGA and FGB are the functional equivalent of intrastate Wide Area Telephone Service (WATS) lines, but at significantly reduced rates.

Mountain Bell testified that FGA, FGB, and FGD are equal to Measured Toll Service (MTS) and WATS as "switched access service" with shared transmission path which transports a call to or from an end-user, within a LATA. The rates for such services from the interstate access tariff depend on the status of equal access within a particular LATA. As equal access becomes available in particular switching offices, carriers subscribing to access services will move from transitional (discounted rate) to non-transitional (full priced) rates for interstate usage. Mountain Bell asserted that the discounts in the interstate federal access tariff for FGA and FGB are not cost-based. The proposed Mountain Bell rate is $730/month/circuit.

The UIEC proposed an additional provision to the Switched Access Services section specifying that options and features described in that section may not be available in all independent company end offices. The UIEC proposed to limit FGA terminations to the local calling area. This would mitigate the potential for revenue loss that would occur if customers chose to replace existing service with FGA.

Continental concurred with UIEC that FGA should be restricted to the local calling area.

MCI presented testimony that there are significant cost differences and competitive disadvantages with regard to the forms of access that are currently available to MCI in the state of Utah. According to MCI, access is inferior because:

(1) FGA and FGB require MCI customers to dial twelve more digits per call than AT&T Communications customers.

(2) MCI suffers significant transmission loss on the FGA (line side access) obtained in the state of Utah, while there is no similar transmission loss in the type of access AT&T Communications and Mountain Bell have for their long distance services.

(3) FGA and FGB services require more expensive interfaces in the MCI switches than the Feature Group C (FGC) interfaces used by AT&T Communications and Mountain Bell. MCI also testified that Mountain Bell does not send answer supervision over FGA which, therefore, requires MCI to provide hardware and software in its switches to simulate such answer supervision.

MCI testified that Mountain Bell's costs to provide FGA and FGB access is significantly lower than the cost to provide FGC access to AT&T and Mountain Bell. MCI concluded that cost differences constitute a justification to support a significant differential or discount access charges for FGA and FGB compared to access charges for FGC and FGD.

The primary thrust of TRU's testimony was to demonstrate justification for a discount on FGA and FGB. In TRU's testimony the discount is justified on a temporary basis because the access to the public switch network provided to resellers is inferior to that provided to Mountain Bell and AT&T Communications. TRU's testimony asserted that the access of resellers is inferior in the following respects:

(1) Lower quality transmission over FGA than provided to AT&T and Mountain Bell,

(2) FGA does not provide Automatic Number Identification (ANI) which requires customers of resellers to enter personal identification numbers of from 5 to 7 digits,

(3) FGA does not provide answer supervision which requires resellers to use sophisticated and expensive software and hardware to detect when customers answer and hang up,

(4) FGA cannot be accessed by customers with rotary phones without special equipment, and

(5) Since reseller customers must dial more numbers to complete calls the resellers are required to invest in more expensive switching equipment than the established carriers.

Mountain Bell's rebuttal testimony to the direct testimony of TRU and MCI made the following points:

(1) Line side switched access services such as FGA, which is used extensively by resellers and SCC's is not inferior to the resellers' present interconnection with

WATS.

(2) Access services represent an economic advantage to resellers even at non-discounted rates to the rates that they would be paying if they were reselling WATS.

(3) Line side interconnection appears to be satisfactory for most resellers for terminating calls even when the superior FGD is available to them.

Mountain Bell further asserted that there is no need for larger, more expensive switching equipment or additional trunks due to the number of digits dialed by resellers' customers and that there is no discernible difference between two (lineside) and four (trunk) wire connections and premium carriers do not always have four wire connections.

MCI, in rebuttal testimony, pointed out the differences from a customer point of view between FGA and FGB as opposed to FGC and FGD. The primary difference is that additional digits must be dialed to obtain access. MCI also pointed out that line side connections afforded through FGA and FGB are inferior, providing only one-half to one-fourth of the signal strength (three to six decibel loss) of other access methods. There are significant differences in switch interfaces between FGA and FGB on the one hand, and FGC and FGD on the other, which require additional investment by carriers and resellers. FGA does not provide answer supervision to the MCI switch, thus requiring additional hardware and software to provide such service.

2. Pricing

Feature Group A and B connections are presently discounted in the interstate tariffs until equal access has been achieved in the Central Office. Mountain Bell proposes non-discounted rates primarily to avoid experiencing adverse revenue impacts as a result of a shift from MTS and WATS to FGA and FGB circuits.

Mountain Bell represented it would receive $54,413 annually from AT&T Communications for intrastate inter-LATA access. The amount of revenue that would be received under the access charge tariffs from resellers and other carriers cannot be estimated at this time because intrastate usage by them is not presently known.

The Division supported the proposals by Mountain Bell and the UIEC to offer FGA and FGB at non-discounted rates.

The Division does not believe it is necessary to adopt a rate structure for feature group connections that gives a significant discount to intrastate interexchange carriers, such as resale carriers, as a means to encourage their competition with either Mountain Bell or AT&T Communications.

TRU testified that if premium non-discounted rates are adopted as proposed by Mountain Bell and others, resellers using FGA access would be forced to charge their customers intrastate toll rates in excess of those charged by established carriers. TRU argued that the shortfall in revenues projected by Mountain Bell would not occur and that, in fact, a net increase in

revenue, even if the full discount is implemented, would occur.

TRU indicated that until equal access is implemented discounts for FGA and FGB are necessary because of their inferiority to FGC and FGD and asserted that failure by the Commission to recognize the need for a discount would be fatal to many Utah-based resellers. TRU disagreed with the Division's characterization of the interstate discounts for FGA and FGB as being primarily to promote competition. They pointed out that the real justifications for transitional pricing for FGA were:

(1) line quality,

(2) competition, and

(3) the provision for going to premium rates at the time when equal access FGD lines do become available.

MCI in rebuttal testimony disagreed with the Division's proposal to place into effect non-discounted rates for FGA and FGB, stating that the service is inferior. Since MCI must compete with a carrier enjoying superior interconnection (Mountain Bell), MCI is placed at a competitive disadvantage. This could be offset by an appropriate discount.

MCI testified that a transitional discount for non-premium FGA and FGB should be part of the Utah intrastate access tariff just as it is part of the interstate tariff. Such a discount would help to bridge the transition from monopoly provision of long distance service to equal access and competition.

Mountain Bell's rebuttal stressed that discounted FGA and FGB services would give pricing incentives to resellers to maintain their present form of interconnection, rather than move to FGD when equal access becomes available.

3. Restricting Feature Group A Foreign Exchange Off-Network Access Line (FGA-FX/ONAL) to the Local Calling Area.

Mountain Bell proposed to restrict FGA-FX/ONAL service to the local calling area as has been traditionally done. The reason for this proposal is to maintain continuity with other foreign exchange services provided by Mountain Bell and other local exchange carriers. This service provides dial tone to an individual subscriber and not a general access line to an inter-exchange carrier.

AT&T opposed the limitation to the local calling area because it is discriminatory and does not allow full use of the connection. Mountain Bell rebutted the presumption that restriction of FGA-FX/ONAL type service would be discriminatory on grounds that the service was traditionally provided in that manner prior to divestiture.

4. Reporting and Auditing

Because Mountain Bell's proposal, if adopted, would result in state rates differing from federal rates for FGA and

FGB, special reporting and auditing procedures would be necessary to assure proper booking of revenues and expenses. Mountain Bell therefore proposed that quarterly reports be filed by subscribers to FGA and FGB lines showing the number of interstate and intrastate minutes of use for the preceding quarter. The minutes-of-use reports would have to be audited by the local exchange carrier so detailed and accurate records and back-up documentation supporting the reports would have to be maintained for one year.

TRU disagreed with the proposed auditing provisions to the extent that they may allow a competitor to have access to proprietary information. TRU indicated a necessity for protection of proprietary information if the auditing provisions are adopted by the Commission.

The Division recommended that carriers be required to report intrastate usage on a quarterly basis, and that the reports be submitted to the local exchange carrier and to the Division. In addition, the Division recommended that any interexchange carrier who failed to file the required reports would have all usage billed as intrastate usage.

5. Billing Services

"Billing and collection services" apply to both switched and special access services and are offered to all interexchange carriers. Under these tariff provisions, Mountain

Bell would perform certain billing functions for interexchange carrier customers, ranging from message detail recording to bill rendering and collections.

Mountain Bell proposed that it be able to deny local service to customers refusing to pay the toll charges billed by Mountain Bell for other carriers. The Company asserted that the inability to terminate service in this circumstance would increase bad debt and result in a greater write-off. The Company would have to purchase the accounts it billed for SCC's and should be allowed the full range of collection action to collect these amounts because the billing process would not allow for a separation of toll charges from local service charges without substantial investment to modify billing procedures.

The UIEC proposed to delete Mountain Bell's billing and collection tariff section and to replace it with the National Exchange Carrier Association ("NECA") interstate billing and collection tariff in order to avoid costly re-programming and administrative expenditures.

Continental supported the proposal that the UIEC and Mountain Bell should be allowed to provide ancillary services such as billing and collection, recording, and directory assistance. These services, under the proposed access services tariff, would be an alternative source of revenue to help keep exchange carriers whole.

The Division recommended that the Commission order Mountain Bell and the UIEC to revise the billing and collection

services provisions by itemizing the charge for customer termination service. The Division indicated that adequate information is not yet available to determine the precise amount that should be itemized for such charges. However, the Division recommended that the Commission order Mountain Bell to prepare this information in association with the proposed tariff revisions. If the Commission decides not to require Mountain Bell to itemize the customer termination service, it should at least require Mountain Bell to increase the rate for billing and collection service to a level which accounts for the value of the customer termination service.

The Committee recommended that Mountain Bell should not be allowed to terminate local exchange service for non-payment of long distance charges billed by Mountain Bell pursuant to its billing and collection tariff.

Mountain Bell's rebuttal testimony addressed issues raised by the Committee and the Division. With regard to issues raised by the Committee, Mountain Bell pointed out that the billing systems of carriers other than AT&T Communications do not require Mountain Bell to terminate local service for nonpayment because it can selectively deny access to customers. With regard to AT&T, however, long distance calling cannot be blocked without prior denial of local exchange service. Mountain Bell further addressed the effect of denial on AT&T's uncollectible rate and the marketing advantages to Mountain Bell in being able to provide billing and collection service. Mountain Bell pointed

out several reasons why the Commission should permit continuation of denial of service and the benefits derived by Mountain Bell customers as a result of such service. Among these were the following:

(1) Ratepayers benefit directly by not having to cover the costs generated by nonpayers. Furthermore, such customers have the convenience of one phone bill for local service and for long distance.

(2) There are distinct advantages to Mountain Bell in being able to operate a single balance due system with denial for nonpayment. Under that situation, Mountain Bell can utilize its current billing system with a minimum of change to provide service to all carriers. This, in effect, turns a cost center and potential stranded investment into a profit center. Furthermore, if Mountain Bell were required to change from a single to a dual or multiple balance due system, the cost would be extensive and would have to be recovered from ratepayers in some manner.

With regard to the testimony of the Division, Mountain Bell indicated that the Division's proposal to require optional denial by carriers who subscribe to Mountain Bell billing services could have a significantly adverse affect on Mountain Bell because Mountain Bell would incur the expense of changing its billing system without assurance that any customer would subscribe to the service. Mountain Bell could conceivably charge customers of its billing and collection services for the ability

to deny. But to charge too much for such a service and to ignore the competitive nature of billing and collection services might force customers to provide billing and collection services themselves or obtain such services elsewhere. This would be detrimental to the Mountain Bell general ratepayer.

6. End-User Common Line Charges

Mountain Bell has not recommended collection of non-traffic sensitive (NTS) costs from end-users in this proceeding even though the Company states that doing so may at some time be necessary to mitigate uneconomic bypass and to ensure that universal service can be maintained. AT&T and MCI support an end-user charge to collect NTS cost and assert that such a charge is proper. Mountain Bell stated that NTS costs should be recovered in access charges in the short-term, but that an orderly transition from carrier recovery to end-user recovery is necessary to prevent bypass and consequent revenue losses. Mountain Bell's position is that these issues should not be considered by the Commission in this proceeding, but at a later date. The Committee and Division testified that no end-user charges for access services should be adopted by the Commission in this proceeding.

7. Time-of-Day Pricing

TRU testified that an equitable access charge tariff would include time-of-day pricing. This would allow resellers and others to take advantage of off-peak rates.

Mountain Bell, however, asserted that access charges priced on a time-of-day basis would not be cost-based. Such prices would favor carriers or resellers whose market is mostly residential customers and would harm carriers whose market is primarily business customers.

8. Blocking

MCI testified that it is impossible to accurately determine the true points of origination and termination of some calls. Because of this, it should not be required to block calls based on their point of entry into the MCI network.

The Division testified that blocking intrastate calls from SCC's would be unreasonably costly and not in the best interest of the general public. The Division stated that it would be more appropriate for technical changes to be made to equipment in order to prevent the use of FGD connections for completion of unauthorized intrastate intra-LATA or inter-LATA calls.

9. Pay Telephones of Interexchange Carriers

The Division recommended that tariffs be revised to add a specific element for the provision of access service to coinless pay telephones owned by intrastate interexchange carriers.

10. Special Access Services

"Special access service" is a dedicated transmission path between an interexchange carrier and an end-user within a LATA. Mountain Bell indicated that an interstate special access service tariff has not been approved by the FCC, but following such approval Mountain Bell would file a revised tariff that would mirror the interstate service arrangements.

Concerning the special access service charges proposed by Mountain Bell, AT&T recommended that the rate levels for such services should be adjusted downward so that they are equivalent to the private line rates applicable to end-users, until such time as Utah-specific costs are developed and rates based on those costs can be established by the Commission. The Division recommended that special access service rates should be approved as proposed by Mountain Bell. TRU removed their objection to this offering after the service had been clarified.

C. Competition

Mountain Bell testified that the telecommunications market is becoming increasingly competitive and that Mountain Bell is vulnerable in such a marketplace because of regulatory restrictions which apply to it but not to competitors. Mountain Bell stated that fair competition is Mountain Bell's goal. Mountain Bell is not seeking immediate deregulation, but it must have greater flexibility in its service offerings and pricing requirements. Mountain Bell recommended that it be permitted to compete effectively and equitably.

Competition currently exists in the intra-LATA long distance market. Mountain Bell presented a description of the technology that makes competition increasingly viable for customers and increasingly difficult for regulators to control. Mountain Bell presented a Utah-specific study indicating that nine percent of residential customers, 18 percent of single-line business customers and 44 percent of two- to six-line business customers use alternative carriers or resellers to complete intrastate toll calls. Also, 49 percent of the seven-or-more-line business customers use alternative carriers, resellers, or a private network to complete intra-LATA intrastate calls. Mountain Bell estimates its market share in the intrastate intra-LATA toll market at approximately 79.6 percent. Further testimony indicated that the primary reason cited by customers for use of alternative suppliers is cost savings and that customers are increasingly choosing alternative suppliers. Its competitors, Mountain Bell asserts, operate under less stringent regulatory conditions than it does. Mountain Bell is subject to greater regulation than its competitors in pricing policies and subsidization requirements, in bookkeeping requirements, and in capital recovery procedures. As a result of regulation, Mountain Bell lacks the flexibility to respond to changes in the market, and, in addition, faces regulatory lag.

Mountain Bell strongly supports allowing competition to exist but insists competitors must face equal conditions. Competition exists in the intra-LATA market and it will continue to grow despite actions the Commission may take to prevent it.

Mountain Bell recommended that intra-LATA competition be permitted and that a transition plan under which interexchange competing services would be deregulated should be formulated by the Commission.

In summary, Mountain Bell recommended that the Commission recognize the reality that competition exists in the marketplace and that the Commission should authorize it, so long as all competitors, including Mountain Bell, are governed by the same regulatory requirements.

UIEC testified that while members of the UIEC are not opposed to toll competition in concept, they feel that very few of the benefits of competition would be realized by subscribers who reside in rural and small urban areas. Benefits from competition would generally accrue to the larger population areas of Utah and not to areas of the state having low density toll routes.

The UIEC stated that over the long term, intrastate competition will become a fact of life. But, an orderly transition to competition should occur. At this time there are aspects of intrastate competition that have not been studied. The SCC's or OCC's must have the burden of showing that competition would be advantageous to Utah subscribers.

It is reasonable, according to UIEC, to anticipate a decrease in MTS revenue as a result of competition for two basic reasons. First, loss of business to competitive carriers would

reduce revenues and secondly, existing toll rates may fall. Any loss of intrastate toll settlements would push local rates up. The UIEC requested that the Commission:

(1) Delay the implementation of intrastate intra-LATA toll competition until sufficient Utah-specific data has been analyzed to determine the impact of competition on Utah subscribers and carriers and to determine whether competition is in the public interest; and

(2) Establish procedures and time periods for the collection of the Utah-specific data necessary to determine whether intrastate intra-LATA toll competition is in the public interest.

Continental indicated that it agreed with UIEC and that it is premature to allow intra-LATA competition in the state of Utah. If the Commission feels that competition is appropriate at this time, the Commission should also consider implementing both a system of access charges and a universal service fund. Continental testified that intra-LATA competition is not appropriate at this time because the impact it may have on the revenue requirements of local exchange and toll carriers is unknown. Also, stranded investment in high cost areas may be caused by the deaveraging of toll rates. Continental testified that the deaveraging of toll rates is a natural development of competition since high traffic density along some routes lowers the cost per conversation-minute-mile for that route, whereas less dense

routes have much higher costs per conversation-minute-mile. Therefore, Continental testified, one of the results of competition would be increased rates on rural routes, unless some means is found to subsidize such service.

Navajo testified that should the Commission authorize competition in any form within the state of Utah, care must be taken to insure that the access charge revenues generated are adequate to maintain earnings levels currently being experienced by local exchange carriers.

MCI testified that Utah residents would benefit from facility-based competition in the intra-LATA long distance market. Competitive markets are superior to uncompetitive markets at producing the goods and services demanded by consumers; competitive markets result in the most efficient use of productive resources; competition offers the greatest opportunity to introduce new technologies and services; and competition allows society to spend less on regulatory procedures.

AT&T presented the results of its study of the current status of telecommunications competition in Utah, the growth of competition during the last two years, the economic impact of sanctioning full intra-LATA competition in Utah, and the problem of providing service in an economically efficient manner to remote areas and to low-income residents. Four general conclusions resulted from the study:

(1) Interexchange carriers have significantly penetrated all segments of the telecommunications interexchange market in Utah. Ten percent of residential and 41 percent of business customers in Utah currently use carriers other than Mountain Bell or AT&T Communications for their long distance calls.

(2) The growth of alternative carriers' share of the interstate and intrastate market has been dramatic over the past two years.

(3) The use of alternative carrier services is heavily skewed toward high-volume users. Of residential customers whose long distance bills are less than $25 per month, only five percent had shifted to alternative carriers. Of those customers with bills between $25 and $49 per month, 11 percent were using alternative carriers and for those customers with long distance bills exceeding $50 per month, 26 percent had shifted to alternative carriers. For those business customers with $25 or less in long distance billings per month, only three percent had shifted; for those customers between $50 and $100 per month, 37 percent had shifted; between $100 and $300, almost 50 percent had shifted, and if the bill exceeded $300 per month those using alternative carriers was approximately 80 percent.

(4) Most business and residence customers of alternative carriers are already using those services to place intrastate calls.

AT&T recommended that the Commission open the intra-LATA intrastate market to facility-based interexchange carrier competition and claimed that the competitive environment would create an incentive to offer new and creative services, would stimulate rapid technological improvements as carriers are given incentives to modernize plant, would create incentives for carriers to keep their costs at the lowest possible level, and would result generally in lower priced services.

The Division stated that competition has already been authorized for intrastate intra-LATA toll service provided by intrastate interexchange resale carriers. The possibility of reduced toll revenues for Mountain Bell and the UIEC do not justify a regulatory response of attempting to restrict the competition for intrastate toll service by facility-based interexchange carriers.

1. Resellers

AT&T testified that the reseller definition is very complicated and unclear and that no distinction should be made between sellers and resellers in the state of Utah. The Division testified that from the standpoint of the telecommunication customer there is not any difference between a reseller and a SCC.

2. Interexchange Facility-Based Carrier Competition

AT&T testified that facility-based competition should not threaten universal service, since the Commission may use access charges as a means of providing cost support for local service. AT&T recommended the approval of intrastate competition for all companies offering long distance service to the public because intrastate competition already exists and the Commission can assure that the potential benefits thereof flow to consumers in Utah only by establishing the proper competitive environment. AT&T contends that if facility-based competition is not allowed, a double standard would be created which would exclude AT&T from a market that all other carriers can enter on a resale basis. The Division recommended that the Commission adopt no distinction between resellers and facility-based Specialized Common Carriers (SCC's) and recommended that intrastate facility-based competition be allowed.

Mountain Bell strongly supported allowing competition to exist but asserted that all interexchange carriers (facility-based or not) must face equal regulation. UIEC testified that not enough information is known as to the impact that interexchange facility-based competition would have on local rates and Universal Service. UIEC proposed that a task force be formed to examine the impacts of competition and to make proposals to the Commission concerning the movement to interexchange facility-based competition.

3. Dominant/Non-Dominant Carrier

The Division recommended that intrastate inter-LATA and intra-LATA competition should be based on a dominant/non-dominant carrier form of regulation. Mountain Bell should be classified as a dominant carrier of intrastate intra-LATA services because it can significantly influence the rates of its competition by the levels of its access service charges. The intrastate resale carriers and SCC's should be classified as non-dominant carriers. Mountain Bell, as the dominant intrastate interexchange carrier, would continue to be subject to its current revenue and rate regulation requirements. The non-dominant carriers, on the other hand, should be subject to the certificate application, tariff and other minimal regulatory requirements outlined in the Division's proposed rules for intrastate resale carriers.

MCI agreed with the Division's proposal that the Commission adopt a dominant/non-dominant regulatory approach, with Mountain Bell regulated as the dominant carrier. The reason for this proposal is that Mountain Bell has market power as a supplier of intra-LATA services and should be regulated. Furthermore, Mountain Bell enjoys superior interconnection which gives it significant advantages. MCI should be subject to "streamlined" regulation only, because detailed oversight of rate of return, tariff rates and facilities is not necessary because MCI does not possess market power.

AT&T testified that the Commission should begin to relax regulatory requirements for all interexchange carriers. AT&T suggested that earnings regulation be eliminated and tariff filing requirements streamlined. AT&T testified that this would not harm consumers.

With regard to the type of regulation that carriers should be subject to, AT&T testified that any attempt to regulate some firms fully and allow others to be regulated in a less stringent manner or to be subject to less stringent requirements is not an appropriate policy for the Commission to adopt. AT&T testified that dominant/non-dominant regulation inevitably results in the loss of market share by the dominant firm even though such a firm may have lower marginal costs and may be the low-cost or the most efficient carrier.

Mountain Bell stated that intra-LATA competition should be authorized with little or no regulatory oversight, provided Mountain Bell is permitted to compete on equal terms. Mountain Bell desires to compete at the same level of regulation as other providers of intrastate intra-LATA toll competition.

4. Ubiquitous Service

Mountain Bell stated its intention to continue to provide ubiquitous service. There are no plans by Mountain Bell at this time to reduce the amount of service it provides.

MCI stated it is not capable at this time of providing ubiquitous service and intends to expand its presence as equal access becomes available.

The Division testified that it would be impractical and unnecessary to require all intra-LATA SCC's to provide call origination service within the state of Utah when it is not required of telecommunication resellers.

5. 1 + Dialing

Mountain Bell testified that it must be able to retain its exclusive right to 1 + Dialing intra-LATA access. Otherwise it would be placed at a competitive disadvantage since it cannot provide interstate services.

The Division recommended that Mountain Bell remain the preference carrier for intrastate intra-LATA toll services, and as such, be the only interexchange carrier authorized to provide "dial 1" intra-LATA toll service. In exchange for that right, the Division recommended that Mountain Bell be designated the carrier of last resort for any customer requiring intra-LATA long distance service and that AT&T Communications should be the carrier of last resort for intrastate inter-LATA long distance toll services.

TRU stated that the Division's proposal to allow Mountain Bell to be the sole provider of "Dial 1" service in the state of Utah ran counter to the concept of "equal access" since "equal access without 1 plus dialing is not equal access."

Mountain Bell rebutted TRU by indicating equal access was an interstate item required by the Modified Final Judgment and that this allows the Bell operating companies to retain 1 plus dialing on an intra-LATA basis.

6. Preference Carrier

The UIEC recommended that Mountain Bell be designated as the preference carrier and carrier of last resort. Contel indicated that Mountain Bell should be designated the carrier of last resort and that Mountain Bell should be responsible for preparing toll rate tariffs in the state of Utah. Mountain Bell recognizes that it is the provider of last resort within its certified territory. The Division recommended that Mountain Bell be designated as the preference carrier.

7. Non-Traffic Sensitive (NTS) and Traffic Sensitive (TS) Cost

Continental testified that toll carriers should reimburse local exchange carriers within the LATA through the use of access services and that interexchange carriers should be regulated if their traffic in the intra-LATA market becomes more than incidental. Continental indicated that the exchange carriers' local distribution plant is part of the integrated telecommunications network and is of great value to an interexchange carrier. Since total loop usage is part of toll costs, toll users should be responsible for covering an appropriate share of the NTS costs. This argues for a non-weighted minutes-of-use factor to allocate NTS costs to toll services.

With regard to NTS costs, AT&T testified that predivestiture support levels from intrastate toll should be identified, capped and phased down over a predetermined schedule. Rates for the recovery of NTS cost subsidy levels should be set

accordingly. AT&T further testified that Utah's proposed access charge is based on the interstate cost, as developed by the FCC, which assigns some cost not incurred or duplicated in providing access to Utah's local exchange network. This implies that Utah intrastate toll subsidy of NTS cost has been occurring at the same level as the intrastate toll subsidy. This assumption represents a discriminatory intrastate cost increase. These access charge levels appear to be out of line with the rates charged to customers who obtain access directly from the local exchange carriers for intra-LATA toll and private line.

TRU testified that Mountain Bell's proposed toll rate reduction in Docket No. 84-049-01 would further widen the gap between the rates for its intra-LATA toll customers when compared with the access costs which are included in the rates charged to intrastate customers of the interexchange carriers.

Mountain Bell responded to a statement by AT&T expressing concern that Mountain Bell's toll rates as proposed in the 1984 rate case would not provide as much NTS cost support as the access charge proposed by Mountain Bell would. In that regard Mountain Bell provided an analysis based on 1983 actual data which indicated that currently Mountain Bell is providing greater NTS cost support than is provided under access charges and that even with the proposed toll reduction the amount of NTS cost support from access charges and from Mountain Bell toll rates would be roughly equivalent.

The UIEC requested that interexchange carriers continue to pay their fair share of NTS costs.

8. Deaveraging of Toll Routes

Mountain Bell asserted that it must be able to separately price specific toll routes and to deaverage rates on competitive routes. The Division's position is that Mountain Bell should be allowed to competitively price its long distance services and to submit innovative toll pricing tariffs.

UIEC recommended a carefully formulated plan to introduce toll competition into the Utah intra-LATA market and incorporate within that plan measures to mitigate the negative consequences of toll competition. These measures should include establishing an appropriate regulatory environment, requiring local exchange carriers to develop intra-LATA access tariffs based on Utah-specific costs and developing universal service and life-line service procedures and funds.

9. Mountain Bell Separation of Competitive and Non-Competitive Services

Mountain Bell stated that equivalent regulatory treatment should be afforded all carriers, including Mountain Bell, provided Mountain Bell separates its regulated costs and revenues from its interexchange costs and revenues. The latter issue, however, should be explored in a separate proceeding. Mountain Bell recommended that the Commission order it to remove its competitive interexchange investments, expenses and revenues from its regulated rate base, but to do so in a separate proceeding. Mountain Bell agreed that its competitors need to be

assured that Mountain Bell does not subsidize its competitive services with monopoly revenues and that the costs of Mountain Bell's competitive services reflect comparable costs charged to carriers under access charges.

TRU, MCI, Sprint and AT&T agreed that Mountain Bell should separate its competitive services from its other services.

E. Bypass

Mountain Bell presented the results of a study of the nature, extent and implications of bypass in Utah. The study, based on interviews with the largest users of Mountain Bell's Utah services, found:

(1) One in eight of the largest Utah customers of Mountain Bell already engages in bypass.

(2) One in four of Mountain Bell's largest Utah customers have indicated an intent to bypass in the future, depending in part on attractiveness of new technologies.

(3) Bypass is accelerating in Utah.

(4) The decision to bypass is primarily motivated by the customer's opportunity to reduce costs.

(5) The interexchange market will become increasingly competitive. As a result, interexchange carriers may soon begin interconnecting their switches directly to the premises of the large customers. The potential revenue loss to Mountain Bell could be massive if interexchange carriers sell bypass on a large scale.

(6) Revenue lost to bypass is lost in the current year and in future years.

Mountain Bell recommended that the Commission take actions necessary to enable it to compete effectively. Bypass should not be encouraged by inappropriate pricing of Mountain Bell services. Some means by which other regulators have dealt with the bypass problem include:

(1) Termination liability requiring large users to pay for unamortized plant stranded when bypass occurs;

(2) Contractual arrangements, instead of tariffs, governing terms of service to large users;

(3) Pricing services at incremental cost, rather than average cost;

(4) Capping the amount of NTS costs recovered from large users in order to prevent recovery of costs not caused by large users;

(5) Deaveraging prices for services in highly competitive zones or along highly competitive routes;

(6) Permitting discretionary price changes by a Company, within Commission-approved minimum and maximum prices;

(7) Reducing the time before new prices become effective in competitive offerings;

(8) Imposing the same degree of regulation on all competitors; and

(9) Total deregulation of specific services for which the Commission determines that a competitive market exists.

Since Mountain Bell no longer has an absolute monopoly on the origination and termination of traffic in its service area, the Company must be allowed to compete on the basis of price and customer services or it will lose its customer base.

The Division recommended that the tariffs be revised to prevent end-users from obtaining access services unless they have their own private telecommunications system which is a by-pass system.

F. Universal Service

Mountain Bell stated that it remains committed to universal service, interpreting this to mean that virtually everyone should have access to basic service. The problem, then, is how best to subsidize the service for those who cannot afford it. Mountain Bell stated that this problem is made more difficult by the fact that it, now facing a competitive marketplace, must depart from traditional average-cost pricing. Mountain Bell agrees that low-income customers should be assisted by funds obtained through legislative action, but, if the Legislature does not act, the Company does not oppose changes in rate structure to obtain the same end. According to Mountain Bell, basic telephone service should be available at affordable rates to a high percentage of persons--similar to the percentage who now enjoy such service. The question is, who should receive the subsidy and

from whom should it be derived. Mountain Bell testified that subsidy alternatives include legislative subsidization to the indigent, a universal service fund, and NTS cost support through access charges assessed equally to all carriers, including Mountain Bell. Hearings should be held to examine the costs of providing basic telephone service in Utah,as such data is a prerequisite for such public policy decisions.

1. High Cost Areas

Continental testified that if intrastate competition is allowed, some substitute for pooling of revenues, which would offer cost protection to high cost toll routes, must be put in place.

AT&T recognized the need for subsidization in high cost areas of the state or to low-income residents. The most efficient solution is to target subsidies for those portions of the market not attractive to competition. With regard to high cost areas and in order to avoid unacceptable increases in local subscriber rates, AT&T testified that some selected limitation on the speed of the proposed phase-out of non-traffic sensitive cost subsidies and/or the establishment of a high-cost fund to assist in limiting subscriber rate increases may be necessary and appropriate for the Commission to consider.

2. Universal Service Fund

The Division indicated that universal service can no longer be guaranteed by intrastate toll revenues. As a consequence, the Division recommended that a state universal service

fund be established, with contributions provided by a surcharge on minutes of use of switched access services. Under the access services tariff, this would be applied to all specialized common carriers and private bypass systems. The Division recommended that the Commission should establish a separate proceeding to further consider a state universal service fund, surcharge amounts and means of distributing funds to support a subsidized budget service for low-income subscribers.

G. Public Witnesses

In addition to the testimony presented by the various parties, seven witnesses appeared as public witnesses in this proceeding. Mr. Arthur W. Brothers, the President of Beehive Telephone Company, presented several exhibits which attempt to develop what an appropriate cost would be on a statewide basis for NTS plant. Mr. Brothers suggested to the Commission that, if it wishes to address the issue of competition in Utah, local exchange companies must be directed to file tariffs showing a cents-per-minute charge on all long distance calls. Mr. Brothers proposed a rate of ten cents per minute for terminating traffic and five cents per minute for outgoing plus incoming traffic. He testified that local exchange carriers cannot continue to exist in the environment of competition unless they are able to charge for the use of NTS plant. Fifty percent of the revenue requirement should be derived from toll, based on a minutes-of-use charge. The remaining revenue requirement can be achieved through local service charges.

Mr. Cox, representing Central Utah Telephone Company, described the service provided by this company and indicated the importance of telephone service to the industrial base of Sanpete County. He further indicated that large increases in basic telephone rates would have devastating effects on the residents in his area.

Public testimony was presented by Mr. Bruce B. Hall, an employee of Crescent Cardboard Company. Mr. Hall's testimony related to his company's attempt to interconnect with a facility-based carrier known as Systems Communications Corporation (Syscom) in the Uintah County area. The thrust of his testimony was to encourage the Commission to give an early hearing date and consideration to the application of Syscom for certification.

Mr. Bryan L. Jacobs, an employee of Motorola Communications and Electronics, presented testimony similar to that of Mr. Hall, encouraging the Commission to give consideration to the certificate application of Syscom. Mr. Jacobs indicated that his company was the provider of certain equipment to Syscom.

The final public witness was Dr. George Compton, a self-employed utility regulation consultant. The thrust of Dr. Compton's testimony was that lowered toll rates along the Wasatch Front are in the public interest. Dr. Compton presented four hypothetical strategies for reducing toll rates in the presence of competition. The essence of Dr. Compton's testimony was that competition is appropriate and should be allowed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission finds that the answers to its questions, posed in its order of June 1, 1984, are:

Q. Should the Commission authorize intrastate intra-LATA competition by Specialized Common Carriers (SCC's) for message telecommunication services?

A. The Commission should not allow, at this time, competition by specialized common carriers or facility-based interexchange carriers. As recommended by UIEC, a telecommunications task force should be established to analyze and determine the effect of such competition on the local exchange carriers.

Q. What impact would intra-LATA competition by SCC's have on Mountain Bell's and the independent telephone companies' revenues from message telecommunication services?

A. The impact of intra-LATA competition has not been determined and needs further study.

Q. What revisions to Mountain Bell's intra-LATA message telecommunication service rates would be required for Mountain Bell to remain competitive with the SCC's?

A. Mountain Bell would have to be competitive, have a separate account, and pay the same for access as other common carriers.

Q. Would the approval of intrastate intra-LATA competition by the SCC's for message telecommunication services

require the establishment of intra-LATA carriers access charges? If yes, how should the intra-LATA carriers access charges be structured? How should the intra-state allocation of non-traffic sensitive costs be apportioned between the inter-LATA carriers access charges, intra-LATA carriers access charges, intra-LATA message telecommunication service and wide area telecommunication service rates and the rates for local exchange services?

A. The need for an access charge is not dependent on the approval of facility-based interexchange competition. Competition already exists between Mountain Bell and the resellers on an inter- and intra-LATA basis and access charges are required. These charges should be based on the non-discounted interstate access charges implemented by the FCC. Non-traffic sensitive cost should be apportioned between all services, but a Utah specific analysis is required for this purpose.

Q. Should Mountain Bell and the independent telephone companies be allowed to provide ancilliary services (billing services, recording services, directory assistance service, security investigative services, and testing services) to SCC's that compete for intra-LATA message telecommunication services?

A. Mountain Bell and the independent telephone companies should be allowed to provide ancilliary services to

interexchange carriers that compete for intra-LATA message telecommunication services.

Q. What are Mountain Bell's plans and time schedules to provide equal exchange access to all SCC's for inter-LATA message telecommunication services? When will pre-subscription to the interexchange carriers be initiated by Mountain Bell? Will the equal access connections allow Mountain Bell or the SCC's to prevent the SCC's customers from using their system for intra-LATA telecommunication services?

A. Mountain Bell has already started the switch to equal access as required under divestiture. Pre-subscription has also been initiated. Equal access (FGD) will allow interexchange carriers to prevent customers from using their system for intra-LATA calls. Equal access will be available for 80 percent of Mountain Bell lines by September 1, 1986.

Q. Should the Commission set a specific intrastate usage limitation for SCC's below which they could continue to operate without a Certificate of Convenience and Necessity and tariffs?

A. Because of the lack of information on intrastate usage, SCC's and other interexchange carriers must obtain certificates as resellers for the intrastate calls completed over their systems. (See Finding of Fact Number 4 below.)

Q. What standards should the Commission use to affirm the fitness of an SCC to receive a Certificate of Convenience and Necessity to operate as an intra-LATA carrier? On what basis should the Commission approve rates and tariffs for an SCC providing intra-LATA message telecommunication services? Should the Commission forbear from regulating rates, requiring tariffs or applying any of its existing rules and regulations for an SCC providing intra-LATA message telecommunication services? Should the Commission establish any new regulatory requirements for an SCC providing intra-LATA message telecommunication services?

A. The standards, rates and tariff approval, exempting or applying existing rules, or development of additional rules and regulation for facility-based interexchange carriers, if allowed, should be determined after the impact of such competition has been analyzed by the telecommunications task force and reported to the Commission. In the interim the SCC's will operate under the rules which apply to resellers.

Q. Should SCC's be required to provide ubiquitous intra-LATA message telecommunication services?

A. SCC's and other interexchange carriers cannot at the outset, nor possibly in the future, provide ubiquitous service and therefore should not be required to provide ubiquitous service.

Q. Should Mountain Bell be designated as the "preference carrier" for intra-LATA message telecommunication services?

A. Mountain Bell should be designated as "preference carrier" at least until the telecommunications task force has completed its study.

Q. Should Mountain Bell be designated as the "carrier of last resort" for intra-LATA message telecommunication services?

A. Mountain Bell stated that is is willing to be the "carrier of last resort" and will be considered so at least until additional study by the telecommunication task force has been completed.

Q. If intra-LATA competition is not authorized, should the Commission require interstate SCC's to install equipment to block intra-LATA message telecommunication service?

A. In addition to the evidence and testimony herein, the Commission takes administrative notice of the testimonys filed in cases 84-094-01 and 84-095-02 in which the ability of SCC's and other interexchange carriers to block intrastate calls has been at issue. The aforementioned cases were dismissed when the parties (MCI and Sprint) received certificates to be resellers. Issuing resellers certificates seems the most logical solution to this question. The Commission finds that

either blocking unauthorized intrastate calls or the reporting of intrastate calls completed as resellers should be requirements of SCC's operating in Utah. (See Finding and Conclusion No. 4 below.)

2. National policy, primarily antitrust policy, does not pursuade the Commission that state regulatory policy should encourage competition at the expense of reasonable service to the citizens of this state. Evidence on this record is inconclusive but does cast doubt on the soundness of encouraging competition at the expense of reasonably priced service, particularly in areas outside the Wasatch Front.

The effect of the Commission's finding is that, until clear and convincing evidence shows that the benefits of competition outweigh the effect of higher local service cost on universal service, Utah regulation will not encourage competition by providing the competitors of interexchange carriers discounts or allowing point-to-point competition, and will require access charges based on the nondiscounted FCC tariff.

The Commission finds that competition for intra-LATA toll traffic should be permitted only for resellers using the facilities of the presently certificated exchange carriers.

3. The Commission finds FGA-FX/ONAL service, is similar to the present foreign exchange services offered by local exchange carriers. Therefore, FGA-FX/ONAL should be restricted to the local calling area.

4. The Commission finds that the connections of interstate and intrastate FGA and B are identical. The need to separate the usage between jurisdictions becomes necessary with the difference in rates between interstate and intrastate FGA and B. Therefore, the Commission will require: 1) interexchange carriers utilizing feature group connections for interstate service, but not certificated to complete intra-LATA toll calls, must block all unauthorized intra-LATA calls, or 2) each certificated interexchange carrier utilizing feature group connections to complete intrastate calls must file quarterly reports with the local exchange carrier and the Division showing the number of intrastate minutes of use per circuit. The interexchange carriers shall maintain records of use, which may be audited by independent auditors upon the request of the local exchange carrier or the Division. Any interexchange carrier failing to provide such a quarterly report or auditable records will face a rebuttable presumption that all usage of the circuit is intrastate.

5. The Commission finds that the billing services and other ancillary services relating to FGA, B and D connections provided by local exchange carriers to interexchange carriers are of value to those carriers. In addition, billing and ancillary services can provide a source of revenue to help reduce the need to increase local rates due to inter and intrastate toll competition. Therefore, approval for billing and ancillary

service should be granted, allowing termination of local service for non-payment of long-distance bills collected by the local exchange carrier.

6. The Commission finds that an end-user line charge has not been proposed and, therefore, makes no determination of this issue at this time.

7. Competitors in the intrastate toll market need to cover the cost they impose on the network. Rates for services to interexchange carriers should be set to cover the costs of interexchange carriers' usage of the network as well as connection costs.

8. Time-of-day pricing for FGA and B has not been cost-justified in this proceeding and should be denied without prejudice.

9. The Commission finds that the request for a specific element to access the network by coinless pay phones of interexchange carriers has merit. Therefore, local exchange carriers should modify their access tariffs to include a specific element for coinless pay phones of interexchange carriers within 60 days of the effective date of this order. This element should, at minimum, parallel the privately-owned coin-operated telephone tariffs approved by this Commission.

10. The Commission finds that special access services, which are not available at this time, should be approved upon acceptance by the FCC of Mountain Bell's proposed tariff.

11. The Commission finds that the access tariffs proposed by the local exchange carriers are fair and reasonable

12. The Commission adheres to the definition of "resellers" used in Case No. 82-999-05, and rejects the changes proposed by AT&T and the Division for the reason that a reseller does not own the transmission path by which intrastate long distance calls are completed.

13. The Commission finds that additional information on the impact of facility-based interexchange carrier competition is needed. Therefore, the Commission will not allow facility-based interexchange carriers to compete in intrastate telecommunication services but will reconsider the issue when the telecommunications task force presents its findings to this Commission on the impact of facility-based interexchange carrier competition and other related issues.

14. The Commission finds that the issue of dominant/nondominant carrier regulation and its impact should be further explored by the telecommunications task force.

15. The Commission finds that Mountain Bell will continue to provide ubiquitous service in its service area and would have to obtain permission from this Commission to discontinue ubiquitous service provision. However, other interexchange carriers do not have the ability to provide ubiquitous service and therefore, will not be subject to requirement.

16. The Commission finds that Mountain Bell, at present, is restricted by Judge Greene's Modified Final Judgment from providing inter-LATA and interstate service. Providing "1+ Dialing" to all intrastate intra-LATA interexchange carriers

would place Mountain Bell at a disadvantage. Therefore Mountain Bell is not required to provide "1+ Dialing" to intrastate intra-LATA interexchange carriers at this time.

17. The Commission finds that additional information should be obtained by the telecommunications task force regarding preference carrier regulation .

18. The Commission finds that more cost information is required for purposes of appropriately allocating NTS cost to access charges. Utah-specific costs must be developed. The telecommunications task force should examine these issues and make recommendations to the Commission regarding them.

19. The Commission requires additional information on deaveraging toll route charges. The telecommunications task force should examine this issue and make recommendations to the Commission regarding it.

20. The Commission finds that Mountain Bell's request for a hearing to separate its competitive services from regulated services can wait until the telecommunications task force has made its recommendations to this Commission.

21. The Commission finds that by-pass is another form of competition faced by Mountain Bell. Therefore, the telecommunications task force should make recommendation to this Commission about by-pass.

22. The Commission finds that the issues involving universal service (high-cost areas and universal fund) should be further studied either by the telecommunications task force or in the lifeline proceeding, Case No. 85-999-13.

23. The Commission finds that WATS resellers have heretofore been in violation of our earlier orders. However, based on the record herein, it is in the public interest to modify the certificates of such WATS resellers to include long distance telecommunications utilizing feature group services. Modification of the certificates will be allowed by application and Commission summary procedure. No further hearing is necessary.

Based on the foregoing, the Commission makes the following

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That:

1. The access charge tariffs be and are hereby approved as modified in the Findings of Fact, to be effective as of December 1, 1985, or as soon thereafter as practicable.

2. A telecommunications task force, consisting of representatives of Mountain Bell, the Utah Independent Exchange Carriers, the Division, the Committee, AT&T, the SCC's and the Commission, is to be formed. Names of the representatives shall be submitted to this Commission within 30 days from the date of issuance of this order and a meeting to organize the task force shall be conducted within 45 days of the issuance of this Order.

The telecommunications task force will study the following issues:

a) Benefits and problems associated with an orderly transition to a facility-based competitive market for provision of long distance services, with emphasis on the problems of deaveraging toll routes and protection of universal service.

b) The extent and type of regulation required to insure a competitive market; the problems of dominant/non-dominant regulation, ubiquitous service, and preference carrier.

c) Utah-specific costs to be included in access charges.

d) The Commission recognizes that widely divergent views will be represented on the telecommunications task force and does not expect consensus on every issue. The Commission does anticipate an analysis of the pros and cons from the perspective of all parties.

3. Facility-based interexchange carrier competition is disallowed until and unless the findings and recommendations of the telecommunications task force, having been fully considered in subsequent proceedings, show such competition to be in the public interest.

4. IT IS FURTHER ORDERED that all presently certificated WATS resellers may petition the Commission, by summary procedure without further hearing, for an amendment to their certificates to allow resale utilizing feature group services.

DATED at Salt Lake City, Utah, this 29th day of October, 1985.

Brent H. Cameron, Chairman

James M. Byrne, Commissioner

David R. Irvine,
Commissioner Pro Tempore

Attest:

Georgia B. Peterson
Executive Secretary

Tab B

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of Access Charges for Intrastate Inter-LATA and Intra-LATA Telephone Services.	CASE NO. 83-999-11 ORDER

ISSUED: February 6, 1986

By the Commission:

On October 29, 1985, this Commission entered its Order in the above-entitled and numbered matter. Subsequently, AT&T, Telecommunications Resellers of Utah, MCI, and the Division of Public Utilities on November 14, and 18, 1985 filed petitions for review, rehearing, stay, and clarification.

MCI and Telecommunication Resellers of Utah assert, inter alia, that the Commission has an insufficient record to make a finding on the fairness of the access tariffs because of the lack of Utah-specific cost and pricing information; that the tariffs do not take into account the cost differences in providing Feature Group A & B as compared to the cost associated with providing Feature Groups C & D; and that the tariffs also do not reflect the value difference of the "inferior" line-side connections (FGA and B) when compared to trunk-side connections (FGC & D).

In its petition for rehearing, AT&T states that the rates approved by the Commission are inordinately high and will severely impact the limited number of customers that are served on an intrastate inter-LATA basis by AT&T. AT&T services approximately 400 customers intrastate inter-LATA and the increase for

such customers will be around 220 percent. AT&T also asserts that the access rate merely mirrors the interstate tariff and is not based on Utah-specific costs. Its final argument is that since there is extensive intrastate intra-LATA competition, that the proposed access tariff is the appropriate method of collecting revenues, but, since there is no intrastate inter-LATA competition in Utah, there is no justification for the large increase that its "border anamoly" customers will have to pay.

The Division of Public Utilities petitioned for clarification of five points in the Order. These points are as follows:

1. Pricing. Since the original filings in this case, there have been several modifications to the interstate access tariff. Is the Commission approving the filed access tariffs of Mountain Bell and the Utah Independent Exchange Carriers, or the modified 1985 tariffs, or the new 1986 interstate access tariffs?

2. Reporting and Auditing. The Division requests clarification whether the auditors on their staff are authorized to perform the audits of the interexchange carriers; and if the audit is requested by the Division to be performed by an independent auditor, whether the interexchange carrier would be responsible for the cost of the audit.

3. Billing and Collection Services. The Division believes the Commission's Findings and Order have overlooked whether the rate for billing and collection services is the

appropriate rate given the value of the customer termination service.

4. By-Pass. The Division feels that the Commission's Finding that the Telecommunications Task Force should make recommendations on by-pass is unclear whether the recommendations include the Division's previous recommendation in this case.

5. Non-Traffic and Traffic Sensitive Costs. The Division believes that the Commission's Order is unclear about whether the Telecommunications Task Force or Mountain Bell and Utah Independent Exchange Carriers should be ordered to prepare the Utah-specific cost study for the consideration of the Telecommunications Task Force.

The Commission was well aware that the Utah-specific costs were not available during the access charge proceeding. As a Commission, we would have liked to have had such costs before us. However, the need for an access tariff was apparent, as the record indicates. We did not have time to wait for Utah-specific cost data. We did, however, try to make it clear that an adjustment of the access tariff would be considered following the examination of the Utah-specific costs by the Telecommunications Task Force called for in the Order.

The remaining issues raised by MCI, TRU and AT&T are questions we believe were fully examined in the hearing and considered by the Commission. We do not see anything in the petitions to persuade us that our decisions were in error in light of our opinion regarding intra-LATA competition.

Based upon the foregoing, the Commission will make the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Telecommunications Resellers of Utah, MCI and AT&T motions for rehearing, review, and stay are denied.

IT IS FURTHER ORDERED, That the petition for clarification is granted in summary fashion. The clarifications are as follows:

1. Pricing. The Commission had one set of tariffs before it during the hearings on access charges. No other tariffs were presented for this Commission's consideration, and until other tariffs are filed for approval, the tariffs that we approved are those presented by Mountain Bell and the Utah Independent Exchange Carriers in the subject proceeding.

2. Report and Auditing. By statute, the Division's auditors are the investigatory arm of the Commission. They are independent from the underlying exchange carriers and, accordingly, may perform the required audits on the reporting of access minutes of use. If the Division's manpower is such that an outside independent auditor is required, the Division will be responsible for the cost.

3. Billing and Collection. The Commission has not overlooked the Division's request that a separate rate element be included for the right to terminate service if Mountain Bell is doing the collection for the interexchange carrier. The

Commission did not find that the demand for Mountain Bell's billing and collection service was sufficient to indicate that there was any additional value for termination.

4. By-Pass. The Commission requested that the Telecommunication Task Force examine and make recommendations about by-pass. This would include the Division's recommendation in this case.

5. Non-Traffic and Traffic Sensitive Costs. As members of the Telecommunications Task Force, it is assumed that Mountain Bell and the Utah Independent Exchange Carriers would provide the Utah-specific cost study to the Task Force. The Task Force's review of those costs would be included in its report to the Commission.

DATED at Salt Lake City, Utah, this 6th day of February, 1986.

Brent H. Cameron, Chairman

James M. Byrne, Commissioner

Brian T. Stewart, Commissioner

Attest:

Georgia B. Peterson
Executive Secretary

Tab C

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of Access Charges for Intrastate Inter-LATA and Intra-LATA Telephone Services.	CASE NO. 83-999-11 ORDER

ISSUED: March 7, 1986

By the Commission:

The Mountain States Telephone and Telegraph Company (Mountain Bell) filed its Motion for Clarification in this matter on February 7, 1986, seeking an Order of this Commission clarifying the effective date of the Commission's Report and Order of October 29, 1985.

Memoranda were filed by Mountain Bell and by Tel-America of Salt Lake City, Inc. (Tel-America).

A hearing was held before the Commission on February 17, 1986, at 9:00 a.m., at which time argument was presented by various parties. The Division concurred in the motion of Mountain Bell. Tel-America and AT&T opposed the motion.

ANALYSIS

The issue raised by Mountain Bell's Petition is whether the various Petitions for Review or Rehearing filed by parties on November 14 and 18, 1985, had the effect of suspending the implementation of the access tariffs approved by this Commission in its October 29, 1985, Order.

The ordering portion of the October 29th Order reads as follows:

NOW, THEREFORE, IT IS HEREBY ORDERED, that:

1. The access charge tariffs be and are hereby approved as modified in the Findings of Fact, to be effective as of December 1, 1985, or as soon thereafter as practicable.

2. A telecommunications task force, consisting of representatives of Mountain Bell, the Utah Independent Exchange Carriers, the Division, the Committee, AT&T, the SCC's and the Commission, is to be formed. Names of the representatives shall be submitted to this Commission within 30 days from the date of issuance of this Order and a meeting to organize the task force shall be conducted within 45 days of the issuance of this Order. The telecommunications task force will study the following issues:

a) Benefits and problems associated with an orderly transition to a facility-based competitive market for provision of long distance services, with emphasis on the problems of deaveraging toll routes and protection of universal service.

b) The extent and type of regulation required to insure a competitive market; the problems of dominant/non-dominant regulation, ubiquitous service, and preference carrier.

c) Utah-specific costs to be included in access charges.

d) The Commission recognizes that wide divergent views will be represented on the telecommunications task force and does not expect consensus on every issue. The Commission does anticipate an analysis of the pros and cons from the perspective of all parties.

3. Facility-based interexchange carrier

> competition is disallowed until and unless the findings and recommendations of the telecommunications task force, having been fully considered in subsequent proceedings, show such competition to be in the public interest.
>
> 4. IT IS FURTHER ORDERED, that all presently certificated WATS resellers may petition the Commission, by Summary procedure without further hearing, for an amendment to their Certificates to allow resale utilizing feature group services.

Section 54-7-15, Utah Code Annotated states:

> Any application for review or rehearing made ten days or more before the effective date of the Order as to which review or rehearing is sought shall be either granted or denied before such effective date, or the Order shall stand suspended until the application is granted or denied. (Emphasis added).

In December, Mountain Bell requested by letter that Tel-America report its percentage of interstate usage so that billings could be properly rendered under both the interstate and intrastate tariffs. Tel-America refused to supply such information on the basis that the tariffs had been stayed as the result of the filing of the Petitions for Review or Rehearing.

Mountain Bell took the position that the Report and Order of October 29, 1985, was intended by the Commission to be effective immediately; that is, while the access tariffs were to be implemented on December 1, 1985, the Report and Order was intended to be effective on the date it was issued. Mountain Bell cited paragraphs 2

through 4 of the ordering portion of the October 29th Order, and argued that since those provisions were, on their face, intended to be effective immediately, that the language in paragraph 1 related only to the effective date of the tariff and not to the Report and Order generally.

Tel-America argued that, while paragraphs 2 through 4 may have been intended to be effective immediately, paragraph 1 was clearly intended to be effective on December 1, 1985. Tel-America's theory was that the Commission had actually issued four separate orders which did not necessarily have the same effective date. Since paragraph 1 indicated that it was to be effective on December 1, Tel-America assumed that the November 18th filing by the Telecommunications Resellers of Utah of its Petition for Review or Rehearing--which occurred more than 10 days prior to December 1--had the effect of staying the tariffs.

Having heard the arguments of the parties and having reviewed the memoranda filed by the parties, the Commission concludes that the Report and Order issued by it on October 29, 1985, was effective when issued. Therefore, the stay provision of Section 54-7-15 did not suspend the effective date of the tariffs.

The Commission intended that the Report and Order be effective on the date of issuance. We believe that the

language of the Report and Order makes that clear. Tel-America argued that the Commission issued four separate orders, which did not have the same effective date. To the contrary, our Report and Order contains several related and dependent sup-parts and was issued and effective on October 29, 1985. The issues related to the tariffs, the task force, the disallowance of facilities-based competition, and the amendment of current certificates were not independent ships passing in the night, but were related parts of an overall Order.

The Commission notes that the language relied upon by Tel-America in Section 54-7-15 uses the words "effective date of the Order." As it is phrased in the singular, we believe the legislative intent was to refer to the Report and Order issued by the Commission and not individual parts. Whatever the Legislature intended, we hereby state that our intent was that the Report and Order be considered an integrated whole and that it was to have immediate effect.

The fact that paragraph 1 stated an effective date for the tariffs of December 1 is not dispositive. First, the language in Section 54-7-15 refers to the "effective date of the Order" and not, as Tel-America would have it read: "the effective date of the tariff."

Delaying the implementation of a tariff does not mean that the Order approving it is ineffective until that date. To the contrary, such a date is established because the utility must prepare and file final tariff sheets with the Commission and must make all the internal adjustments and training necessary to implement such tariffs. Thus, significant time and effort are expended prior to the date the tariffs become effective. As such, there is no inconsistency in making an Order effective immediately, even though the tariffs approved by such Order are not to be implemented until a later date.

It further concerns the Commission that nowhere and at no time did Tel-America raise this issue with the Commission. No explanation has been given to us for this omission.

NOW, THEREFORE, based on the foregoing, the Commission hereby

ORDERS

1. That the Motion of Mountain Bell for Clarification is hereby granted.

2. That the Report and Order of October 29, 1985, approving the access tariffs was effective upon issuance and the Applications for Review or Rehearing filed on or about November 14, 1985, do not suspend the implementation date of those tariffs.

DATED at Salt Lake City, Utah, this 7th day of March, 1986.

Brent H. Cameron, Chairman

James M. Byrne, Commissioner

Brian T. Stewart, Commissioner

Attest:

Georgia B. Peterson
Executive Secretary

Tab D

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of Access Charges for Intrastate Inter-LATA and Intra-LATA Telephone Service.	)))))	CASE NO. 83-999-11 ORDER DENYING PETITION FOR REVIEW AND/OR REHEARING OF TEL-AMERICA

ISSUED: May 1, 1986

By the Commission:

On March 25, 1986, Tel-America of Salt Lake City, Inc. ("Tel-America") filed with the Commission a Petition for Review and/or Rehearing ("Petition") of the Commission's Order of March 7, 1986, which clarified the effective date of the Commission's Report and Order of October 29, 1985 in this matter pursuant to Mountain Bell's Motion for such a clarification filed February 7, 1986.

By its Petition Tel-America raises no issues, facts or law that were not previously raised by it in its earlier Memorandum. We did not, however, previously respond directly to Tel-America's argument that Section 54-7-10(2) and Rule 18.3 of the Commission's Rules and Regulations operate to require the Commission to expressly state an effective date for its order or have it become effective 20 days after issuance. That argument does not support Tel-America's position. First, that Section and that Rule apply only to orders issued by the Commission in Complaint proceedings. This case does not deal with a complaint and thus the Commission need not state an effective date for its order--it is presumed that the order is effective upon issuance.

Second, even if this were a complaint case and the Commission had omitted to state specifically an effective date so that the order took effect twenty days after issuance (i.e. on November 18, 1985), the filing of petitions for reconsideration by various parties (not including Tel-America) on November 14, 1985 would not operate to stay the implementation of the tariff on December 1, 1985 because the filing was less than 10 days prior to the effective date.

Based upon the foregoing, the Commission will make the following:

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That the Petition of Tel-America for Review and/or Rehearing be and the same is hereby denied.

DATED at Salt Lake City, Utah, this 1st day of May, 1986.

/s/ Brent H. Cameron, Chairman

/s/ James M. Byrne, Commissioner

/s/ Brian T. Stewart, Commissioner

Attest:

/s/ Georgia B. Peterson
Executive Secretary

Tab E

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Investigation of Access Charges for Intrastate Inter-LATA and Intra-LATA Telephone Services.	CASE NO. 83-999-11 ORDER DENYING PETITION FOR REVIEW AND/OR REHEARING OF TEL-AMERICA

ISSUED: June 24, 1986

By the Commission:

On May 20, 1986, Tel-America of Salt Lake City, Inc. ("Tel-America") filed with the Commission a Petition for Review and/or Rehearing or, in the Alternative, Motion to Reopen in connection with the Commission's Order of May 1, 1986 and its Report and Order of October 29, 1985. The essence of Tel-America's position and argument is that the Commission may only approve the access charge tariffs through rulemaking.

Tel-America asserts that the Commission issued its Report and Order in a rulemaking proceeding, i.e. in a matter designated with a 999 number. Tel-America apparently presumes that every case designated with a 999 number is a rulemaking matter. That is not accurate. 999 numbers may indeed be used to designate a rulemaking matter but are also used for generic matters which cannot be classified as rulemaking.

It is true that the Administrative Rule Making Act (Section 63-46a-1 et. seq.) requires rulemaking when a class of persons is affected by agency action. However, rulemaking is not required under the Act--even in generic proceedings--when the

procedure or standard is already prescribed by statute. (See Section 63-46a-3(4)(a)).

In this particular case the statutorily-prescribed procedure for effecting changes in tariff rates and charges is by the filing of proposed tariffs by the utilities and, in the event that the tariff so filed contains an increase, holding a hearing to review the justification for the increase. The increase must then be specifically approved by Commission order (Section 54-3-3, and 4 and 54-7-12, Utah Code). The instant matter is such a one. It was precipitated by the Commission's Order of August 29, 1983 requiring the filing of access charge tariffs by the local exchange carriers in Utah. The tariffs filed contained an increase in the rates charged for access to local networks. The Commission scheduled and held extensive hearings on November 14-17, 19-21 and December 4-7, 1984 following notice to all affected parties. In addition to the testimony presented by the various parties, seven witnesses appeared on Public Witness Day November 21, 1984. The hearings were adjudicative in nature in that the Commission received prefiled and oral testimony of the witnesses, cross-examination was allowed and the parties were represented by counsel. The Commission thereafter reviewed the record and approved the proposed tariffs.

We find no merit in Petitioner's claim that the Williams case (Williams v. Public Service Commission of Utah, No. 19867 decided March 4, 1986) mandates rulemaking in this case.

The facts and circumstances of the Williams case are totally different and in no way implicate rate-increase considerations.

Based upon the foregoing, the Commission will deny Petitioner's Petition.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, That Petitioner's Petition for Review and/or Rehearing or, in the Alternative, Motion to Reopen be and the same is denied.

DATED at Salt Lake City, Utah, this 24th day of June, 1986.

/s/ Brent H. Cameron, Chairman

(SEAL)

/s/ James M. Byrne, Commissioner

/s/ Brian T. Stewart, Commissioner

Attest:

/s/ Georgia B. Peterson, Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 1987, I served four copies of the foregoing Brief on Appeal by mailing a copy thereof in a sealed, postage-paid envelope, to the following:

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and that I served one copy of the foregoing Brief on Appeal by mailing a copy thereof in a sealed, postage-paid envelope, to the following:

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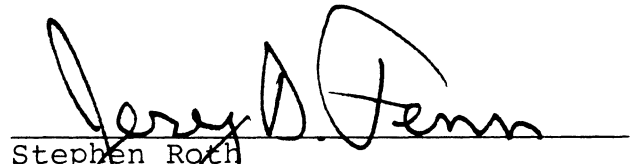

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